(1) No. 96-730 NOV 6 1996

In the

Supreme Court of the United States

October Term, 1996

Dorothy L. Aldrich, *et al.*,

Petitioners,

v.

General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, Raytheon Constructors Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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DATED: November 4, 1996

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QUESTION PRESENTED

1. Whether the retroactive application of a statute of limitations that results in a retroactive time bar of timely filed cases is consistent with due process and the purposes of Congress in enacting and amending the Price-Anderson Act.

PARTIES TO THE PROCEEDING

The interested parties, petitioners, who appeared before the United States Court of Appeals for the Third Circuit in this proceeding are as follows: Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasléy, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert J. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart and Charlotte Evelyn Stewart.

The respondents are General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, Raytheon Constructors Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of a divided panel of the United States Court of Appeals for the Third Circuit, which affirmed an order of the United States District Court for the Middle District of Pennsylvania that dismissed these timely filed actions as being untimely by retroactive application of the Price-Anderson Amendments Act of 1988, Pub.L.No. 100-408, 102 Stat. 1066 [the "Amendments Act"].

OPINIONS BELOW

The relevant, unreported memorandum opinions and order of the United States District Court for the Middle District of Pennsylvania, dated June 15, 1993, August 16, 1993, June 1, 1994, July 14, 1994, and the judgment dated July 22, 1994, are reproduced at A-1–A-63. The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit, reproduced at A-64–A-93, are reported at 89 F.3d 1106 (3d Cir. 1996). The Court of Appeals' Order re: Sur Petition for Rehearing denying rehearing on August 6, 1996 is reproduced at A-92.

JURISDICTION

After denial of Petitioners' request for Rehearing on August 6, 1996, the judgment of the Court of Appeals was entered on August 19, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The text of §20(b) of the Price-Anderson Amendments Act of 1988, the effective date provision (codified as a note to 42 U.S.C. §2014) is set forth in the Appendix at A-96.

STATEMENT OF THE CASE

This Petition seeks review of the claims of 42 plaintiffs who instituted three separate actions each, in three separate forums, to recover damages for their personal injuries resulting from the Three Mile Island nuclear incident of March 28, 1979. The plaintiffs instituted cases in the Pennsylvania Court of Common Pleas for Dauphin County and in the United States District Court for the Southern District of Mississippi during 1985 and early 1986, well before the Amendments Act. In addition, they instituted cases in Mississippi state court in 1988, also before the Amendments Act. These Mississippi actions were protective actions that were timely filed under the Mississippi 6-year statute of limitations. Plaintiffs specifically

relied upon the principles embodied in *Ferens, infra* to take advantage of the greater time period afforded by Mississippi law. Plaintiffs' cases arrived in the Middle District of Pennsylvania by either removal and transfer or simply transfer to that court under the authority of the Amendments Act, 42 U.S.C.A. §2210(n)(2).

Prior to their removal, plaintiffs were contesting the summary judgment based upon Pennsylvania law favoring the defendants and the affirmance by the Pennsylvania Superior Court. While wending their way through the Pennsylvania judiciary, the United States Congress amended the Price-Anderson Act to provide a mechanism to consolidate all actions involving public liability in one district court, which also permitted the Defendants the ability to remove Plaintiffs' Pennsylvania state court cases. *See* Section 11 of the Amendments Act, 42 U.S.C. §§2014(hh), 2210(n)(2). *See also In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied sub nom., Gumby v. General Public Utilities Corp.*, 112 S.Ct. 1262 (1992). Defendants thereupon removed the cases to the district court prior to expiration of the time Plaintiffs had to file an appeal at the Pennsylvania Supreme Court. Plaintiffs then lost their challenge regarding the constitutionality of the Amendments Act removal provisions and conferral of original jurisdiction over pre-existing state law claims in *TMI II, supra.*

Once firmly lodged in the district court, the defendants filed their motion for summary judgment with regard to the applicability of the Mississippi statute of limitations issue to the cases Plaintiffs instituted in the Mississippi federal and state courts. Defendants asserted that Plaintiffs' claims were time-barred even though they were timely filed in Mississippi by arguing that Mississippi's six-year statute of limitations could no longer be applied to these actions consistent with the choice of law provision in the Amendments Act, 42 U.S.C. §2014(hh), which requires the application of the "law of the State in which the nuclear incident involved occurs." Plaintiffs opposed the motion contending that retroactive application of Pennsylvania's shorter statute of limitations to Plaintiffs' Mississippi filed cases pursuant to the Amendments Act would be unconstitutional.

On June 15, 1993, the district court denied Defendants' motion for summary judgment. Because the court agreed that "Congress clearly did not intend retroactive application of the choice of law provision to oust Plaintiffs of their cause of action," it found that the purpose of the Amendments Act to consolidate all related actions into one forum could not also be interpreted to retroactively deprive the plaintiffs of their pending claims. June 15, 1993 Opinion. [A-11–A-13]. The district court also held that it would be inequitable to deprive plaintiffs of their settled expectations on the availability of a six year statute of limitations. *Id.*

Defendants moved for reconsideration of that ruling or in the alternative to certify the issue for interlocutory appeal. Defendants asserted that the effective date provision, §20 of the Amendments Act, which states that, "the amendments made by Section 11 shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act," compelled a retroactive application that would time bar plaintiffs.

The district court agreed. On August 16, 1993, it granted the Defendants' motion for reconsideration and vacated its June 15, 1993 Order. August 16, 1993 Opinion [A-25]. It then completed its analysis of whether the retroactive application of the Amendments Act's choice of law provision provided due process by finding that the Amendments Act was constitutional. August 16, 1993 Opinion at 7-15 [A-29–A-35]. The district court also rejected Plaintiffs' contention that Pennsylvania law, as incorporated into federal law by the Amendments Act, would provide a grace period to file their existing claims. *Id.* at 15-20 [A-35–A-38].

After further motion practice to limit the extent of the summary judgment, the court entered judgment against the Plaintiffs. *See* June 1, 1994 and July 14, 1996 Orders [A-45–A-61]. Judgment on the claims was entered on July 22, 1994. [A-62].

A divided panel of the Third Circuit affirmed the district court based upon the retroactive application of the Amendments Act's choice of law provision to the statute of limitations question and the

refusal to apply a grace period. [A-64]. In so ruling, however, the majority too broadly interpreted the scope of retroactivity for the choice of law provision of the Amendments Act, and failed to recognize the due process requirement of a grace period. The dissenting panelist, adhering to this Court's precedents, made clear that the majority's interpretation required a rewriting of historical events, and an inappropriate retroactive application the Amendments Act. [A-92].

Petitioners now seek review of these rulings by writ of certiorari.

REASONS FOR ALLOWING THE WRIT

This Petition raises significant issues regarding the restrictions on Congress' ability to reverse and alter the expectations of parties by means of retroactive legislation. This Court has long evinced a reluctance to apply legislation retroactively and has reviewed instances where retrospective application of new law has disrupted substantive rights. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994). Even recently, this Court has accepted certiorari in *United States ex rel. Schumer v. Hughes Aircraft Company*, 63 F.3d 1512 (9th Cir. 1995), *cert. granted*, No. 95-1340, 1996 WL 79951 (U.S. Oct. 15, 1996), to determine the propriety of retroactive application of recent jurisdictional provisions of the False Claims Act. This case deserves similar review to prevent the wholesale destruction of plaintiffs' rights which undeniably existed and had been exercised prior to the retroactive legislation at issue.

Review should be granted to dispel any notion that special interest lobbying may eradicate established rights that persons have already exercised. There is no dispute that plaintiffs' claims were properly and timely filed in the Mississippi courts at the time of their filing. When the nuclear industry could not avoid the consequences of the Mississippi statute of limitations and the decisions in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98-99 (1978) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-54, 256 (1984), and the Third Circuit's rulings in *Stibitz v. General Public Utilities Corp.*, 746 F.2d 993, 997 (3d Cir. 1984), *cert.*

denied, 469 U.S. 1214 (1985) and *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986) (Price-Anderson Act created no federal tort causes of action and there was no basis for federal jurisdiction), the industry lobbied Congress. That lobbying effort resulted in the Amendments Act, which was targeted for these cases. However, the spin suggested by such lobbying and adopted by Congress was to consolidate these cases for uniform treatment in continued litigation. These defendants have taken Congress' loose and nebulous endorsement of the consolidation provisions to eliminate claims which this Court's precedents otherwise suggest should proceed. Unless review is granted, whole classes of litigants may in the future have their judicially recognized rights legislated away by the monied interests soliciting Congress. Certiorari represents the last chance to stop any litigant with a powerful lobby from avoiding the precedents of the courts, to vitiate existing and proper causes of action not only after they accrue but after the litigation proceeds to a point where it cannot be altered on appeal. The results turn our system of jurisprudence on its head.

In addition to the broad repercussions that a review of retroactive legislation will provide in general, review of the issues presented are of significant importance to other TMI public liability litigation as numerous additional plaintiffs also rely upon their timely filed claims in Mississippi in addition to the tolling doctrines of the discovery rule and fraudulent concealment to avoid a possible statute of limitations bar to their claims. Although the record has not yet been developed with respect to these additional plaintiffs' statute of limitations issues, review by this Court would impact the rights of hundreds of additional plaintiffs.

A. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE JUDGMENT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The question at the heart of this petition is whether Congress expressed any intent by the choice of law provisions of the Amendments Act that the retroactive application of Pennsylvania's statute

of limitations to all actions arising from the Three Mile Island ("TMI") accident, should be so broadly interpreted so as to result in a shortening of the statute of limitations that existed at the time plaintiffs timely filed their cases in Mississippi prior to the passage of the Amendments Act to time-bar plaintiffs' claims.

As Judge Sarokin in his dissent noted, the majority's analysis is inconsistent with Congress' intent to promote "'equitable and uniform treatment of victims'", *In re: TMI*, 89 F.3d at 1118, *citing TMI II*, 940 F.2d at 861 (*quoting* H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18, 29 (1987)[A-82], and that the majority has failed to give deference to the principle that federal statutes should be interpreted in a manner that does not "'engender[] constitutional issues if a reasonable alternative interpretation poses no constitutional question,' *Gomez v. United States*, 490 U.S. 858, 864 (1989), by eliminating the constitutional questions of due process". *In re: TMI*, 89 F.3d at 1120. [A-85–A-86].

The broad interpretation of "retroactive application" made by the majority contradicts a primary purpose of the Price-Anderson Act: to provide a mechanism for compensating victims of a nuclear incident. That purpose was not disturbed by the newly created "public liability action" of the Amendments Act, *see* 42 U.S.C. § 2014(hh) (defining "public liability action") and 42 U.S.C. § 2210(n)(2) (creating federal jurisdiction and the ability to remove and consolidate public liability actions), the primary purpose of which was to consolidate litigation arising from nuclear incidents, such as TMI, in a single federal forum (*e.g.*, the Middle District of Pennsylvania) in order to facilitate the resolution of such litigation under uniform legal principles, so such uniform treatment could be provided to plaintiffs and defendants. *See In re: TMI*, 89 F.3d at 1114, *quoting*, S. Rep. No. 218, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S. Cong. & Admin. News 1476, 1488 [A-74] and *citing*, *TMI II*, 940 F.2d at 853 n.18. Thus, neither the jurisdictional nor substantive sections of the Amendments Act evidence a change in Congress' intent that victims of nuclear incidents should be compensated. Further, neither of these sections define the rule(s) of law to be applied with respect to

statute of limitations, which, therefore, necessarily requires the interpretation of Congressional intent.

The interpretation of Congress' intent in passing the Amendments Act must be guided by the fact that Congress saw consolidation as a vehicle for achieving the goals of uniformity, equity and efficiency in the disposition of public liability claims, *TMI II*, 940 F.2d at 858, and the need to provide a mechanism for prompt and efficient compensation of victims, *Id.* at 853, all without the inefficiencies and inconsistent results that may have occurred in the absence of the Amendment Act's consolidation, jurisdiction, venue and choice of law provisions.

The majority's interpretation of the Amendments Act's choice of law provision to include the retroactive application of a shorter statute of limitations is not necessary to achieve the delicate balancing of rights and interests of plaintiffs, defendants and the judicial process that Congress struck in the Amendments Act. Therefore, the majority's interpretation sweeps too broadly and violates the due process rights of the 42 plaintiffs-appellants.

As noted by the dissent:

> Congress contemplated providing a mechanism for consolidating TMI cases *to facilitate their continued litigation. This forward-looking approach evidenced by the legislative history is wholly inconsistent with a congressional desire to extinguish those suits on technical grounds.*

In re: TMI, 89 F.3d at 1123 (emphasis added). [A-90].

* * *

Plaintiffs' rights to due process were trod upon by the majority's mistaken conclusion that Congress intended, through the Amendments Act, to retroactively shorten the statute of limitations and totally abolish claims that were timely filed under governing statute of limitations law that existed prior to the passage of the Amendments Act. There is no rational basis for this conclusion which

purports to rely upon *TMI II*. Indeed, this interpretation of Congressional intent is not supported by *TMI II*.

The holding in *TMI II* that the Amendments Act is constitutional did not *abolish* plaintiffs' claims in their entirety, as the holding of the majority does here, but essentially only enabled a change in the forum where the claims were to be litigated and provided federal law to support what would otherwise be an unconstitutional naked grant of federal question jurisdiction. *See In re: TMI*, 89 F.3d at 1114. [A-75]. *TMI II* found that the rational basis for Congress' determination to provide for the litigation of all public liability claims resulting from a single nuclear incident in a single forum was that consolidation could avoid inconsistent results and inefficiency. This "rational" exercise of Congressional power does not, however, support the majority's interpretation that Congress also intended that timely filed cases be retroactively time-barred once they are transferred to the new forum.

Put another way, there is no "rational" relationship between the retroactive application of the Amendments Act to achieve uniformity and efficiency in the resolution of radiation accident cases and the dismissal of timely filed claims that could easily conform with the Act through removal and conversion into federal claims.

This was essentially the position correctly taken by the dissent. It pointed out that there is nothing in the legislative history of the Act to indicate that "Congress even considered the status of statutes of limitation under that Act, much less intended to include them as substantive rules of decision." *In re: TMI*, 89 F.3d at 1122. [A-88–A-89]. "In the statute of limitations context . . . the difference in theory between the . . . interpretations [of retroactivity posited by the majority and the dissent] translates into a crucial difference in outcome." *Id.* at 1120. [A-85]. The majority's interpretation leaves plaintiffs who timely filed claims before the enactment of the Amendments Act with no cause of action, while the dissent permits these plaintiffs' claims to be litigated on their merits, in a new forum, which is what Congress intended to occur by its passage of the Amendments Act.

The majority found reason and rationality in the juxtaposition between a retroactive time-bar of these claims and a mechanism for their *continued* litigation in another forum. However, the majority's reliance on *TMI II* and other cases it cites for the proposition that Congress can retroactively affect how and where pending litigation *will* proceed prior to a final judgment begs the question. *In re: TMI*, 89 F.3d at 1113. [A-72].

In neither *TMI II* nor the cited cases did the courts interpret Congressional intent in a manner that resulted in the arbitrary and irrational consequence of a complete retroactive dismissal that plaintiffs now suffer. Rather, in the cases cited by the majority, a federal statute retroactively abolished a claim against a private party, but still provided that the claim could be maintained against the United States government. *See Arbour v. Jenkins*, 903 F.2d 416, 419-422 (6th Cir. 1990) (the "Federal Employees Liability Reform & Tort Compensation Act of 1988 ("Westfall Act") . . . amended the Federal Tort Claims Act to provide for the substitution of the United States as a defendant in an action where a federal employee is sued for monetary damages arising from a common law tort allegedly committed by the federal employee acting within the scope of his or her employment." Accordingly, the wife of a deceased postal worker could not sue the postal employees for harassment); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805-806 (11th Cir. 1989) (Under the Westfall Act, plaintiff, an employee of the Public Works Department at the Naval Air Station in Pensacola, Florida, could not sue a Navy employee for injuries he sustained when a tank containing sulfuric acid exploded and caused him injuries); *In re Consol. U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 990-92 (9th Cir. 1987) (Under the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, 42 U.S.C. § 2212, plaintiff could not sue private contractors involved in nuclear testing operations for injuries he sustained due to exposure to radiation caused by nuclear fallout. Rather, he was required to sue the United States government for all such injuries), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *Hammond*

v. United States, 786 F.2d 8, 10-14 (1st Cir. 1986) (same as *In re Atmospheric Testing*).

Thus, in the cited cases, the plaintiffs were not left without a remedy; they could still pursue claims against the federal government. And while these cases are certainly consistent with the holding of *TMI II*—that the retroactive alteration of a cause of action and consolidation of claims is constitutional—they do not support the ruling of the majority here: that the statute of limitations can be applied retroactively to time-bar claims, even where there is no congressional directive to that effect, and even where applying the statute of limitations in that fashion is not relevant to the purpose of the legislation in question. By reviewing this important and unanswered question of federal law, this Court would provide certitude to a recurring issue in our jurisprudence where none presently exists.

B. A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The majority's broad interpretation of the Amendments Act so as to extinguish timely filed cases not only does not serve any rational Congressional purpose, but results in an interpretation of the Act in a manner that abridges the plaintiffs' constitutional right of a grace period. The majority's analysis, while questioning the vitality of a grace period under Pennsylvania law, *In re: TMI*, 89 F.3d at 1115, totally ignores the requirement of a grace period under the United States Constitution as interpreted by this Court.

This Court has recognized that due process requires the allowance of a reasonable time after the passage of a new, shorter statute of limitations for a suit to be commenced upon an existing cause of action before it can be considered time-barred. *Block v. North Dakota, ex rel. Board of University and Sch. Lands*, 461 U.S. 273, 286 (1983) ("The Constitution, however, requires that statutes of limitations must allow a reasonable time after they take effect for

commencement of suits upon existing causes of action."); *Texaco Inc. v. Short*, 454 U.S. 516, 527 (1982) ("'It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . . .'"). The majority's conclusion does not provide for this right and contradicts this Court's established precedent.

In this case, the majority has recognized that plaintiffs' Mississippi state and federal court actions were timely filed pursuant to governing law that existed prior to the passage of the Amendments Act. The majority however appears to have concluded that plaintiffs acted improperly by filing claims in the state and federal courts of Mississippi, simply to avoid a possible statute of limitations bar. The majority stated:

> We believe Pennsylvania courts would not look favorably on plaintiffs here who missed Pennsylvania's statute of limitations, although Pennsylvania is the state where the accident occurred, and brought suit in Mississippi.

In re: TMI, 89 F.3d at 1116. [A-77]. Exactly how Pennsylvania courts might view plaintiffs' action is irrelevant. *Id.* at 1122 n.4 (Sarokin, J., dissenting) ("[P]ennsylvania law regarding the statute of limitations has no bearing on the question before us . . . This is purely a question of federal law . . ."). Plaintiffs' claims were timely originated in Mississippi, a proper forum at their time of filing, and the view of Pennsylvania courts on plaintiffs' actions adds nothing to the analysis. The issue is what Congress intended, and whether the newly created federal law can be interpreted consistently with constitutional safeguards.

Similarly, the majority concluded that it is not inequitable to dismiss claims on timeliness grounds, even though they were timely filed in compliance with Mississippi's six year statute of limitations, where the plaintiffs took advantage of filing in a distant forum to gain a longer statute of limitations. *In re: TMI*, 89 F.3d at 1116. However, the inequity of the result here, *i.e.*, absolute dismissal, far

outweighs any inequity caused by federalizing state law claims for radiation-caused injuries as public liability actions, which can be litigated in federal court under federal question jurisdiction. The retroactive change of a state court tort claim to a federal law public liability claim, at least left plaintiffs with claims to pursue, which is far better than being out of court.

Finally, the fact that plaintiffs filed claims in Mississippi should not have been an influence on the majority's analysis. The action that the plaintiffs took to avoid a possible statute of limitations bar was specifically approved in *Ferens v. John Deere Co.*, 494 U.S. 516, 530-31 (1990) (applying Mississippi statute of limitations to action arising in Pennsylvania between plaintiff and defendant who are not citizens of Mississippi), and no adverse inference should have been drawn against plaintiffs for exercising a right that this Court has stated is permissible. The majority opinion totally ignores *Ferens*, arguing that its interpretation of Congress' intent is rational and fair, and does not result in an inequity to plaintiffs. However, contrary to the majority's statements, the result it reaches produces a specific inequity to plaintiffs, *i.e.*, it leaves their timely filed cases now time-barred, by depriving them of their right to rely upon *Ferens*, without any grace period or notice that the timeliness of their claims would now be assessed based upon the retroactive application of a new and shorter statute of limitations.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO
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DATED: November 4, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation	:	Civil Action No.
Cases Consolidated II	:	1:CV-88-1452
	:	
This Document Relates to:	:	
Section I & III—All Plaintiffs	:	
	:	
Section II—the following forty-two	:	
Plaintiffs: Dorothy L. Aldrich, Faith	:	
Alleman, Philip Angeli, Michael J. Anoka,	:	
Catherine J. Balinosky, Regis E. Beasley,	:	
Louis Borda, Betty M. Boylestein,	:	
George L. Boylestein, Shirlean	:	
Burhanan, Ruth Butler, Frank J. Caka,	:	
Susan H. Chynoweth, Daniel M.	:	
Chynoweth, Catherine Costello, John T.	:	
Costello, Martha A. Costik, Richard N.	:	
Costik, Mary Margaret Earhart, Edward	:	
T. Ferguson, Marco G. Glad, Jr., Linda	:	
I. Glad, Barbara Grandon, Helen M.	:	
Hank, Edward John Hertzog, Marie H.	:	
Hertzog, Dianne Hindermyer, George	:	
Vance Hitz, Marjorie B. Hitz, Carol C.	:	
Hoch, Louis A. Hoch, Estate of Robert	:	
P. Holmes, Thelma M. Nagy, Barry	:	
Obercash, Georgeann Pristello, James J.	:	
Pristello, Jaime Lynn Pristello, Kenneth	:	
R. Snyder, Patricia Southard, Joseph F.	:	
Stewart, Charlotte Evelyn Stewart	:	

MEMORANDUM

Several motions are currently before the court in this case. Plaintiffs have filed a motion to compel Defendants to respond more fully to their discovery requests.[1] Defendants, on the other hand, have filed a motion for summary judgment with respect to certain Plaintiffs whose claims Defendants assert are time-barred. Finally, each party has filed a proposed case management plan.

Background

The consolidated claims in this case arise out of the 1979 incident at the Three Mile Island nuclear reactor ("TMI") in Dauphin County, Pennsylvania. Plaintiffs, over 2,000 individuals or businesses located in the vicinity of TMI, allege various physical, emotional and economic injuries as a result of this incident.

The claims that form the basis of this consolidated action were filed in various state and federal courts in Pennsylvania, New Jersey, and Mississippi. Many of the claims were filed in the early 1980's. The path of these claims to their current status in this court is long and meandering.

Many of the cases filed in other fora were removed to the United States District Courts in Pennsylvania and Mississippi based on Defendants' assertions that the claims arose under the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in various sections of 42 U.S.C.). On appeal, the Third Circuit determined that because the Nuclear Regulatory Commission determined that the TMI incident did not constitute an "extraordinary nuclear occurrence," the TMI claims fell outside the provisions of the Price-Anderson Act. *Stibbitz v. General Pub. Utils. Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985); *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986). Therefore, the Third Circuit held that this court had no jurisdiction to hear these actions. *Stibbitz*, 746 F.2d at 997; *Kiick*, 784 F.2d at 494-95. Thereafter, this court remanded those actions originally filed in state court, while those actions originally brought in federal court were transferred to the appropriate state court via state law procedure.

Subsequently, Congress passed the Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2011. The explicit purpose of this amendment

1. Plaintiffs have also filed a motion to compel discovery from non-party TMI Public Health Fund. The court will deal with that motion in a separate order.

was to provide for federal jurisdiction over "any public liability actions." The act retroactively provided a federal forum for all claims arising out of any nuclear incident by granting the district court where the incident occurred original jurisdiction over all such actions and providing for the removal of any action filed or pending in state court. 28 U.S.C. § 2210(n)(2). The constitutionality of this federal forum provision was upheld in *In re TMI Litigation Cases Consol. II (TMI II)*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1262 (1992). Accordingly, pursuant to § 2210(n)(2), all the remaining claims have been consolidated in this court.

In April 1992, this court held an initial case management conference. As a result of that conference, the court directed that discovery commence and set a briefing schedule for certain anticipated motions.

Discussion

I. Plaintiffs' Motions to Compel

Plaintiffs have served Defendants with an initial set of interrogatories, requests for admissions and requests for production. Defendants responded to those requests with a litany of objections. Plaintiffs have moved to compel further responses.

Defendants' responses to Plaintiffs' discovery requests consist of an introductory statement of objection, a list of eleven general objections, and responses to individual requests in the form of references to the various general objections. The primary objections raised by Defendants are that: (1) the information sought is irrelevant because previous rulings in the case decided the fraudulent concealment issue adversely to Plaintiffs and because previous case management orders ruled that issues related to punitive damages should be postponed pending resolution of the claims for compensatory damages; (2) Plaintiffs seek information already made available to them during the course of this litigation; (3) the information sought is protected by the attorney-client and/or work-product privileges; and (4) several miscellaneous objections.[2]

2. Defendants also object to the requests on the ground that the requests exceed the scope of permissible discovery, inquire into communications between Defendants and experts retained for purposes of litigation, are unduly burdensome, and exceed the scope of discovery requests permitted under Middle District rules without having sought leave of court.

A. Fraudulent Concealment and Prior Case Management Orders

In this memorandum and the accompanying order, the court has disposed of the statute of limitations issue.[3] Therefore, the fraudulent concealment issues are moot and discovery regarding these issues cannot be "calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). However, information related to fraudulent concealment but also relevant to other issues must be disclosed.

Upon transfer of an action from state to federal court, a federal court has the power to modify all orders of a state court which are not final, including case management orders. 28 U.S.C. § 1450.[4] *See also Maseda v. Honda Motor Corp.*, 861 F.2d 1248 (11th Cir. 1988). While the state court apparently precluded discovery regarding punitive damages, for the reasons discussed below,[5] this court now believes that discovery should take place as to all issues including punitive damages. To the extent that information relevant to the fraudulent concealment issue is also relevant to the issue of punitive damages, Defendants must comply with requests for such information.

B. Information Previously Made Available

Defendants assert that much of the information sought already has been provided to Plaintiffs in compliance with previous discovery requests. Defendants claim that Plaintiffs failed to take advantage of the opportunity to examine numerous documents and material made available.

At this point, the court's interest is in moving this case to trial. Accordingly, Defendants are to make available to Plaintiffs all material to which Plaintiffs are entitled whether or not it previously was provided. Further, under the Federal Rules of Civil Procedure, a party is under a continuing duty to disclose information. Thus, to the extent that any new information has been sought, Defendants also have a duty to disclose that information.

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3. *See* § II, *infra*.

4. 28 U.S.C. § 1450 provides that, upon removal to federal court, "[a]ll injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved by the district court."

5. *See* discussion of the case management issues in § III.

C. Attorney-Client and Work-Product Privilege

Defendants object to certain requests by Plaintiffs, claiming Plaintiffs seek information covered by the work-product doctrine or attorney-client privilege. The party asserting either of these privileges has the burden of showing that such privilege applies. *United States v. (Under Seal)*, 748 F.2d 871, 876 (4th Cir. 1984); *Hydramar, Inc. v. General Dynamics Corp.*, 115 F.R.D. 147 (E.D. Pa. 1986). However, Defendants have not specified the documents or communications for which they are claiming the privileges. Nor have they identified the author, recipient, date or other information relevant to determining the appropriateness of these privileges.

With respect to any communications for which Defendants seek to claim the attorney-client privilege, they should supply Plaintiffs with information as outlined in *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88 (D. Del. 1974):

> Such a showing is usually by affidavit in which the documents are adequately listed and described showing (a) the identity and corporate position of the person or persons interviewed or supplying the information, (b) the place, approximate date, and manner of recording or otherwise preparing the instrument, (c) the names of the person or persons (other than stenographical or clerical assistants) participating in the interview and preparation of the document, and (d) the name and corporate position, if any, of each person to whom the contents of the document have heretofore been communicated by copy, exhibition, reading, or substantial summarization.

Id. at 93-94 (citing *Manual for Complex Litigation*, pp. 192-193). *See also* Proposed Fed. R. Civ. P. 26(b)(5). Defendants should make a similar showing, including evidence that the documents were prepared in anticipation of litigation, with respect to any document they claim is within the protections of the work-product doctrine.

D. Miscellaneous Objections

Defendants also object to the discovery requests on the grounds that they (1) exceed the scope of permissible discovery because Plain-

tiffs' definitions of the terms "defendant," "you," "your," and "identify" are overbroad and because they require Defendants to produce material not within their possession or control; (2) inquire into communications between Defendants and experts retained for purposes of litigation; and (3) exceed the scope of discovery requests permitted under Middle District rules without having sought leave of court and are unduly burdensome.

With respect to the definitional objections, Defendants must turn over all material within their "possession, *custody*, or control." Fed. R. Civ. P. 34 (emphasis added). However, Defendants have no duty to identify or produce things not within their possession, custody, or control whether or not they possessed them at some time in the past. Finally, Plaintiffs' definitions of "you," "your," and "Defendants" are not objectionable except to the extent that, in the context of a given question, the requests are not reasonably limited to the time periods relevant to this action.

Second, Defendants object that Plaintiffs' requests inquire into communications between Defendants and experts retained for purposes of litigation. Defendants concede that Plaintiffs are entitled to certain factual and historical information furnished by its experts to the TMI Public Health Fund. Defendants are willing to make this information available to Plaintiffs. Plaintiffs are not entitled to discovery regarding Defendants' experts who were retained in anticipation of litigation and are not expected to testify at trial.[6]

Finally, Defendants argue that Plaintiffs' requests exceed the scope of discovery requests permitted under Middle District rules without having sought leave of court and are unduly burdensome. Middle District Rule 402.8 limits to forty (40) the number of interrogatories and requests for admissions a party may serve without leave of court. In this case, Plaintiffs clearly have exceeded the allowable number of both interrogatories and requests for admissions without having sought permission to do so.

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6. The court realizes that it is painting with a broad brush in its ruling on this issue. However, the failure of either party to adequately clarify the facts surrounding the requests and the applicable law on the issue prevents a more detailed analysis.

The court recognizes that this is a large, complex case. Yet, the court believes that the parties should be able to work within the confines of the Middle District rules with minor adjustments. Accordingly, the court will allow Plaintiffs *collectively* forty interrogatories and requests for admissions relating to liability issues and forty interrogatories and requests for admissions relating to punitive damages. Various counsel for Plaintiffs should coordinate their requests to comply with this rule. Defendants collectively are subject to the same limits.

Before exceeding these limits, parties should apply to the court for leave to do so. Leave to exceed these limits will be granted only upon a showing of good cause.

II. Fraudulent Concealment and Allegedly Time-Barred Claims

Defendants have filed a motion for summary judgment against forty-two Plaintiffs[7], asserting that all their claims are time-barred.

The forty-two Plaintiffs at issue filed their claims more than two years but less than six years after the TMI incident. To protect their claims against a Pennsylvania statute of limitations defense, each of the forty-two Plaintiffs filed their claims in three fora: (1) in Pennsylvania state or federal court; (2) in Mississippi state court; and (3) in Mississippi federal court. The relevant Pennsylvania statute of limitations is two years; that in Mississippi is six years.

Plaintiffs assert that none of their actions are time-barred. They argue that the Mississippi actions are timely because they were filed within the Mississippi limitations period; they contend that the Pennsylvania actions are timely because Defendants' fraudulent concealment tolled the running of the limitations period. Defendants, on the other hand, argue that the Price-Anderson Amendments Act of 1988 ("Amendments Act"), 42 U..S.C § 2011, mandates that the Pennsylvania limitations period apply to all actions, including those filed in Mississippi. Further, Defendants urge this court to follow as the law of the case the non-final ruling of the Pennsylvania state court which rejected Plaintiffs'

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7. *See* case caption, *supra*.

fraudulent concealment argument and dismissed Plaintiffs' claims.[8] If necessary,[9] Plaintiffs urge this court to reconsider the state court ruling.

A. Retroactivity of the Amendments Act Choice of Law Provision

The threshold issue this court must decide is whether Congress intended the choice of law provision of the Amendments Act to apply retroactively.

1. Pre-Amendments Act Limitations Period

Prior to the passage of the Amendments Act, the actions filed in Mississippi were governed by the six year Mississippi statute of limitations. The United States Supreme Court recently outlined the relevant Mississippi choice of law rules in a personal injury case: "A Mississippi court would rule that Pennsylvania substantive law controls the personal injury claim but that Mississippi's own law governs the limitations period." *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (applying Mississippi statute of limitations to action arising in Pennsylvania between Pennsylvania plaintiffs and a Delaware defendant). *See also Shrewbrooks v. A.C. & S., Inc.*, 529 So.2d 557, 559 (Miss. 1988) (applying Mississippi statute of limitations to actions where plaintiff and defendant were nonresidents of Mississippi in a transitory cause of action which accrued in another state); *Patton v. Haines*, 556 So.2d 679 (Miss. 1989) (Mississippi action brought by Pennsylvania residents against corporation doing business in that state for injuries sustained on Pennsylvania highway was

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8. *See* Orders: Lipsitt, J., dated July 7, 1987 (granting summary judgment against forty-two Plaintiffs); Lipsitt, J., dated Feb. 20, 1987 (denying motion for reconsideration of February 20, 1987 order); Pennsylvania Superior Court, dated July 15, 1980 (affirming Lipsitt orders of February 20, 1987 and July 7, 1987). The case was removed back to federal court before appeal to the Pennsylvania Supreme Court. Accordingly, the order is not a final judgment to which the doctrine of res judicata applies. 1B *Moore's Federal Practice* ¶ 0.409(1.-1) at III-123. *See also G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916) ("[It is] familiar law that only a final judgment is res judicata.").

9. Because the actions originally filed in Mississippi state court apparently involve the same causes of action and the same parties as the Pennsylvania suits, if the Mississippi actions are viable, the Pennsylvania actions are redundant. In that case, this court need not address the continued viability of the Pennsylvania actions.

subject only to Mississippi statute of limitations and not to shorter Pennsylvania statute).

The result would be the same with regard to an action filed in a Mississippi federal court. Under *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941), the actions filed in federal court in Mississippi would be required to follow the choice of law rules of the Mississippi forum and apply the Mississippi limitations period. Finally, transfer to a federal court in Pennsylvania does not change the applicable law. In *Ferens*, the Supreme Court held that a transferee court must apply the limitations period that would have applied in the transferor court. 494 U.S. at 532. Accordingly, prior to the passage of the Amendments Act it is undisputed that the six year Mississippi limitations period would have governed the cases filed in Mississippi.

2. The Amendments Act Choice of Law Provision

The Amendments Act includes a choice of law provision which, if applicable in this case, would impose the two year Pennsylvania statute of limitations on all actions arising out of the TMI incident, including those filed in Mississippi. In that situation, the forty-two Plaintiffs at issue in this motion might well be out of court.[10]

The Amendments Act choice of law provision dictates that "the substantive rules of decision in [a public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [the Price-Anderson Act]." 42 U.S.C. § 2014(hh).

The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, contains a similar choice of law provision. The OSCLA provision incorporated the law of the state adjacent to certain continental shelf lands as the federal law applicable to criminal and civil matters arising on those lands. The legislative history of the Amendments Act indicates that this OCSLA provision was the model for the Amendments Act:

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10. If the two year Pennsylvania limitations period applies, the forty-two Plaintiffs will be dismissed unless the court chooses not to follow the Pennsylvania state court findings regarding fraudulent concealment or finds that Pennsylvania would engraft a grace period onto the limitations period.

> Rather than designing a new body of substantive law to govern such cases, however, the [Amendments Act] provides that the substantive rules for decision in such actions shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the Price-Anderson Act. The Committee believes that conferring on the Federal courts jurisdiction over claims arising out of all nuclear incidents in this manner is within the constitutional authority of Congress and notes that Congress has used this approach in the Outer Continental Shelf Lands Act.

H. R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 1 at 18. *See also TMI II*, 940 F.2d at 855-56 (Even though the language of the OCSLA and the Amendments Act are not identical, "[t]he legislative history supports [the] view . . . that Congress adopted the approach to state law embodied in the [OCSLA]").

The United States Supreme Court construed the OCSLA choice of law provision to incorporate the adjacent state's statute of limitations as well as substantive law. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-103 (1971). Subsequent OCSLA cases therefore have rejected the application of traditional choice of law principles which would treat a statute of limitations as merely procedural; instead, these courts have held the OCSLA borrowing statute to be all-inclusive. *See, e.g., Bonner v. Chevron U.S.A.*, 668 F.2d 817 (5th Cir. 1982) (applying Louisiana statute of limitations to action brought in Mississippi court arising out of accident occurring off the coast of Louisiana). Given this precedent, Plaintiffs concede that, if the TMI incident occurred today, the Pennsylvania limitations period would govern.

3. Retroactivity of Amendments Act Choice of Law Provision

Plaintiffs do not concede that the choice of law provision should have retroactive effect, however. They argue that neither the statute nor the legislative history indicate that the choice of law provision was intended to apply retroactively.[11]

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11. In the alternative, Plaintiffs argue that, if the Act were so intended, to apply it in this case would be unconstitutional.

While the precise language of the Act does not require a finding that the choice of law provision is retroactive,[12] the reasoning of the Third Circuit in *TMI II*, 940 F.2d at 856, is binding on this court and requires such a finding. In *TMI II*, the Third Circuit upheld the constitutionality of the consolidation provision of the Amendments Act. 940 F.2d at 861. This court previously had ruled that Congress exceeded its authority by attempting to create a federal forum for a state cause of action in the absence of diversity jurisdiction. *In re TMI Coordinated Proceedings*, 735 F. Supp. 640, 645 (M.D. Pa. 1990). The Third Circuit reversed, finding that "Congress intended that the [state] rules of decision constitute federal law." 940 F.2d at 856. The choice of law provision was the operative provision in the statute which acted to incorporate state law into federal. *Id.* Thus, the *TMI II* court clearly relied on the choice of law provision as a basis for jurisdiction *in this case*. Therefore, the provision must be deemed to apply retroactively to the actions now before the court.

However, Plaintiffs argue that though the choice of law provision as a whole may have been meant to apply retroactively, Congress clearly did not intend retroactive application of the choice of law provision to oust Plaintiffs of their cause of action. This court agrees. To so construe the Act would fly in the face of the purposes articulated by Congress.

Congressional attention with respect to the Amendments Acts appears to have been focused on bringing into one forum the plethora of claims arising out of the TMI incident and any similar incidents that might occur in the future.

> The experience with claims following the TMI accident demonstrates the advantages of the ability to consolidate claims

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12. The consolidation provision contains an explicit retroactivity clause:

> Upon motion of the defendant or of the Commissioner or the Secretary, as appropriate, any [public liability] action pending in any State court *(including any such action pending on the date of the enactment of the Price-Anderson Amendments Act of 1988)* or United States district court shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2) (emphasis added). There is no such retroactivity clause modifying the Amendments Act choice of law provision. *See* 42 U.S.C. § 2014 (hh).

> after the nuclear incident. Attorneys representing both the plaintiffs and the defendants testified . . . that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants.

S. Rep. No. 100-218, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488.

This legislative history makes clear that the Amendments Act was designed to promote the fair and efficient disposition of all claims arising out of a nuclear incidents and to ensure a just distribution of funds to compensate all those injured.

> [The] consolidation provision was designed to promote "equitable and uniform treatment of victims," H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18, 29 (1987); "the orderly distribution of funds," H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 3, at 30 (1987); and "the avoidance of similar issues in multiple jurisdictions that may occur in the absence of [consolidation]." S. Rep. No. 218, 100th Cong., 1st Sess. at 13, 1988 U.S. Code Cong. & Adm. News 1488 (1988) . . . . [C]onsolidation in federal court serves to reduce uncertainty, expenditure of resources in dealing with duplicative issues, and the possibility of inconsistent outcomes.

940 F.2d at 861.

Congress adopted the OCSLA choice of law scheme to overcome the thorny jurisdictional concerns addressed by the Third Circuit in *TMI II*.

> Any suit asserting public liability shall be deemed an action arising under the Price-Anderson Act, and the substantive law of decision shall be derived from the law of the State in which the incident occurred, *in order to satisfy the Article III requirement* that federal courts have jurisdiction over cases arising under the Constitution or under the laws of the United States.

S. Rep. No. 100-218, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488 (emphasis added). Thus, the choice of law

provision was thought necessary to provide "arising under" jurisdiction sufficient to allow the TMI and similar future claims to be heard in a federal forum.

Nowhere in the Act or in its legislative history is it apparent that Congress was aware or intended that the Act deprive plaintiffs with pending claims of a cause of action for their alleged injuries. In fact, Congressional intent appears to be to the contrary. The Act contemplated that "any [public liability] action pending" would be removed and tried in a federal forum. 42 U.S.C. § 2210(n)(2). Congress expressly intended the Act to promote the "equitable and uniform treatment of victims." H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18, 29 (1987). Defendants' construction of the statute, however, would deprive a class of victims of all compensation. This is not uniform treatment.

Nor, under the circumstances, does it appear to be equitable. Defendants argue that Plaintiffs have no vested right to their cause of action. While this may be true, Plaintiffs certainly had a settled expectation regarding when their claims could be filed. A plaintiff facing a six year statute of limitations reasonably would expect that he or she could file at any time within that period; such a plaintiff would not necessarily file his or her claim within a shorter period. Plaintiffs apparently relied on these expectations in filing when they did; Plaintiffs' causes of action were timely when filed where they were filed. Defendants' interpretation of the Act would disrupt the parties' settled expectations.

This court will not so interpret the Act in the absence of evidence that Congress knew or intended the effects of the retroactive application of this statute and in light of the incongruity of such an interpretation with the purposes articulated by Congress. Under the circumstances, the only equitable course and the course which appears most faithful to the purposes articulated by Congress is to allow Plaintiffs to rely on the six year limitations period extant at the time they filed their actions.

Defendants argue that Congressional knowledge and intent that the limitations provision apply retroactively to deprive Plaintiffs of a cause of action can be inferred from the OCSLA caselaw. Defendants argue that because the OCSLA choice of law provision has been construed to incorporate the associated state's statute of limitations, Congress must have known that the Amendments Act would be so con-

strued. However, none of the OCSLA cases relied on by Defendants involved the retroactive application of the statute to parties who had filed claims prior to the passage of the OCSLA statute. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Bonner v. Chevron U.S.A.*, 668 F.2d 817 (5th Cir. 1982), both involved causes of action which accrued well after the passage and effective date of the OCSLA. Indeed, when the court in *Huson* overruled a previous line of precedent, it took care not to apply the interpretative change retroactively to the case before it to prevent the inequity of putting the plaintiff in that case out of court. 404 U.S. at 107-108. Therefore, this argument is not persuasive.

Because the court believes that Congress did not intend the limitations period to retroactively deprive the instant 42 Plaintiffs of a cause of action, it need not reach the other issues raised in this motion. The Defendants' motion to dismiss the claims of the 42 Plaintiffs will be denied.

III. Proposed Case Management Plans

The parties have submitted proposed plans and briefed the various issues involved in bringing the large numbers of claims in this case to trial. Because there are a number of difficulties with Defendants' proposed case management plan, the court will adopt Plaintiffs' proposed plan.

A. Defendants' Plan

Defendants propose that the case proceed along several tracks. Track one relating to the statute of limitations defense and the forty-two plaintiffs discussed above is now moot.[13] Track two involves splitting off the issue of the duty owed by Defendants and whether that duty was breached. Track three involves the question of causation and track four deals with punitive damages. Thus Defendants proposal might well result in three separate trials of the various parts of Plaintiffs' causes of action.

Defendants assert that the extent of their duty to Plaintiffs is determined wholly by certain federal safety standards. To that end, they have

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13. Defendants allude to a possible request for an interlocutory appeal on this issue. At this point, the court sees no reason to certify such an appeal.

filed a "Motion for Summary Judgment as to All Plaintiffs Based on Compliance with Federal Safety Standards." (See motion, filed January 26, 1993.) Based on this conception of their duty, Defendants propose that, if the court cannot determine as a matter of law that they have not breached this duty, a trial be held on the duty issue alone. At this initial trial, the jury would determine how much radiation was released during the TMI incident and if Defendants breached any duty to Plaintiffs. Only if the jury were to find a breach would the case continue to a second round of motions and, if necessary, a second trial or series of trials on the causation issue. Assuming a finding for any of the Plaintiffs, a third trial on punitive damages would be held unless the court were to find as a matter of law that punitive damages were unavailable in this case.

While Defendants' proposal to split off punitive damages may be tenable,[14] their proposed bifurcation of the duty and causation issues is problematic.[15] The first problem relates to Plaintiffs' proposed dosimetric evidence. Apparently, Plaintiffs' dosimetric evidence "uses observed health effects and works back to establish the dose received by the population." (Plaintiffs' case management opposition brief at 29.) Defendants assert that dosimetric evidence of the type on which Plaintiffs intend to rely is unreliable and inadmissible. Defendants plan to file a motion *in limine* to exclude such evidence from trial but, at this time, the court has not had an opportunity to address this issue. Yet, it is clear that, if this evidence is admissible, then the liability and causation inquiries will be wholly intertwined and Defendants' plan will not be tenable.

Assuming that the dosimetry evidence were excluded, however, there is a further, more fundamental problem with Defendants' proposed separation of liability and causation issues. This problem has both practical and constitutional dimensions. In sum, Defendants plan still is tenable only if Defendants prevail on the duty issue.

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14. For the moment, the court will defer any decision on bifurcation of the punitive damages issue at trial.

15. Briefing on Defendants' motion for summary judgment regarding duty has been extended several times and is not yet complete. According to Defendants, if this motion is granted, the case would be over. In that case, the issues raised here would be moot. For purposes of the instant motion, however, the court will assume that Defendants' motion will not be granted in full and that issues will remain for resolution.

Under Defendants' plan, Jury #1 (the one examining the duty and breach of duty issues) would have to determine, among other things, how much radiation was released, the period of time over which the release occurred, and the concentrations of radiation in particular places and times. The jury would determine this based on evidence of "the release pathways, the radioactive material discharged through those pathways, meteorological conditions at the time of the releases, scientific measurements both in and outside of the TMI plant of liquid and gaseous releases, and scientific measurements in the air, soil, plants, and people around the TMI plant." (Defendants' reply at 9.) From this information, the jury would have to make what Defendants call a "threshold" or "preliminary" determination whether Defendants violated any federal safety standards. (*See id.* at 4-5 (discussion of findings necessary to determine if duty to Plaintiffs was breached).) Assuming that Jury #1 found no violation, Defendants' plan works: all Plaintiffs would be dismissed and, aside from the inevitable appeals, the case effectively would be concluded.

However, if Jury #1 finds that Defendants did violate a duty, problems arise. After finding where a particular plaintiff was relative to the releases at the time the releases occurred, Jury #2 (the jury determining causation) would have to determine "how much radiation plaintiff thus received from the accident." (Brief in support of Defendants' proposed plan at 2.) The second jury's ability to determine the amount of radiation received by a given Plaintiff requires that it be told or determine for itself how much radiation was at the particular places at the particular times relevant to the Plaintiff in question. Presumably Jury #2 would rely on Jury #1's findings regarding the various levels of radiation at particular times and places.

Yet, Defendants have given no indication how Jury #1 would memorialize its findings in a way that would be useful or useable by Jury #2. Unless the first jury made a series of isometric maps establishing the amounts of radiation discharged from TMI and its concentrations and paths over time, a second jury would have to determine for itself the amount of radiation at the particular locations and times where a given Plaintiff was exposed. To make these findings, it would be required to hear the same evidence heard by the first jury and make the same type of

findings. Thus, the practicality and efficiency of Defendants' plan are dubious.

The constitutionality of Defendants' proposal also is questionable. When utilizing separate trials of different issues in a case, a court must "always [preserve] inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." Fed. R. Civ. P. 42(b). The Seventh Amendment "guarantees a unitary trial of issues." *Mercedes-Benz v. Link*, 550 F.2d 860, 875 n. 28 (3d Cir. 1997). "The constitutional question turns on whether 'the issue to be [tried to a second jury] is so distinct and separable from the others that a trial of it alone may be had without injustice.' " *In re Master Key Antitrust Litigation*, 70 F.R.D. 23, 29 (D. Conn. 1975) (quoting *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931)). "Two juries cannot decide factual questions that are common to both trials and which are essential to a verdict or an award. Factual questions resolved by one jury which could be reexamined by another jury, either directly or indirectly, violates the Seventh Amendment." *Smith v. Alyeska Pipeline Serv. Inc.*, 538 F.Supp. 977, 984 (D. Del. 1982). Because Defendants' plan likely will require a second jury to review the same evidence and make many of the same determinations made by the first jury, it raises serious Seventh Amendment problems.

The problems with Defendants' approach are apparent in their misplaced reliance on *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied sub nom., Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, 488 U.S. 1006 (1989). In *Bendectin*, the Sixth Circuit upheld the trifurcation of cases involving the use of the drug Bendectin by pregnant women. The trial court separated the trial into three phases: (1) causation; (2) other liability issues; and (3) damages. After hearing evidence on the threshold issue of causation, the jury found for the Defendants. In so doing, the jury answered in the negative to the following interrogatory: "Have the plaintiffs established by a preponderance of the evidence that ingestion of Bendectin in therapeutic doses during the period of fetal organogenesis is a proximate cause of human birth defects?"

Defendants compare this inquiry to the "threshold" inquiry they desire in this case. The inquiries are not analogous. Two distinctions are clear. First, in *Bendectin*, the jury truly was asked to make a threshold

inquiry. In *Bendectin*, the issue that the jury was asked to decide was the validity of a scientific hypothesis, i.e., that a known dose of a particular drug would have a particular effect (birth defects) on the children of pregnant women who ingest it. The analogous inquiry in this case would be "Does a given exposure to radiation cause a certain health effect (*e.g.*, cervical cancer)?" Defendants admit that, at least as to some cancers, the link is clearly established.

More problematic is that in *Bendectin*, the jury started with a known dose and was asked to determine the probable effects of such a dose.[16] Here, the dose of radiation is the initial question Defendants seek to have the jury decide. This is a much different and more Plaintiff-specific inquiry. The levels and duration of exposure likely vary greatly among Plaintiffs. Without any agreement as to dose levels, the court doubts that motions similar to those in *Bendectin* would serve much purpose.

Accordingly, Defendants' plan does not provide a workable approach to this case.

B. Plaintiffs' Plan

The heart of Plaintiffs' plan is its proposal to hold an initial mini-trial of the claims of twelve "typical" plaintiffs, half of whom are to be chosen by the plaintiffs and half by the defendants. Under the plan, discovery would proceed immediately as to all issues, including punitive damages. The twelve illustrative Plaintiffs would then proceed to trial on all their claims, including those for punitive damages.

Plaintiffs claim that this initial trial would provide a basis for the parties realistically to evaluate their respective cases and promote settlement of this action. Defendants contend that "the 'test-case' approach does not portend to resolve anything except the test cases selected." (Defendants' reply to proposed case management plan at 36.) Therefore, Defendants assert that the initial twelve-Plaintiff trial would not promote settlement or be otherwise useful.

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16. Presumably, most, if not all, of the *Bendectin* cases involved the ingestion of the drug in the specific known doses prescribed by doctors.

The court believes that Plaintiffs' proposed plan is tenable and will adopt it. In accordance with that plan, Plaintiffs and Defendants shall each choose six representative Plaintiffs' claims to proceed to an initial trial of this matter. The initial trial will include all of the twelve Plaintiffs' claims. The court will defer a decision on whether to bifurcate the punitive damages issue.[17] Details of the case management schedule are contained in the accompanying order.

In order to ensure that this case progresses in a timely fashion, the court intends to hold periodic status conferences. At that time, the parties will have an opportunity to discuss any concerns or difficulties regarding the case. The court will not be able to absorb the cost of such conferences, however. Accordingly, unless the parties can make arrangements among themselves to place and pay for a conference call, the conferences will be held in-chambers.

An appropriate order will be issued.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: June 16, 1993.

17. The court plans to try all claims at one trial, but may choose to try the case in stages, with evidence relating to punitive damages going to the jury only in the event of an initial determination of liability. In that case, the parties may want to consider the feasibility of trying the punitive claims of the entire class at the final stage of the initial trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation	:	Civil Action No.
Cases Consolidated II	:	1:CV-88-1452
	:	
This Document Relates to:	:	
All Plaintiffs, except as to §3 which	:	
relates to the following forty-two	:	
Plaintiffs:	:	
	:	
Dorothy L. Aldrich, Faith Alleman,	:	
Philip Angeli, Michael J. Anoka,	:	
Catherine J. Balinosky, Regis E. Beasley,	:	
Louis Borda, Betty M. Boylestein,	:	
George L. Boylestein, Shirlean	:	
Burhanan, Ruth Butler, Frank J. Caka,	:	
Susan H. Chynoweth, Daniel M.	:	
Chynoweth, Catherine Costello, John T.	:	
Costello, Martha A. Costik, Richard N.	:	
Costik, Mary Margaret Earhart, Edward	:	
T. Ferguson, Marco G. Glad, Jr., Linda	:	
I. Glad, Barbara Grandon, Helen M.	:	
Hank, Edward John Hertzog, Marie H.	:	
Hertzog, Dianne Hindermyer, George	:	
Vance Hitz, Marjorie B. Hitz, Carol C.	:	
Hoch, Louis A. Hoch, Estate of Robert	:	
P. Holmes, Thelma M. Nagy, Barry	:	
Obercash, Georgeann Pristello, James J.	:	
Pristello, Jaime Lynn Pristello, Kenneth	:	
R. Snyder, Patricia Southard, Joseph F.	:	
Stewart, Charlotte Evelyn Stewart		

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1) A status conference will be conducted by the court at 10:00 a.m. on Friday, July 23, 1993. The conference shall be in person in the chambers of Courtroom No. 2, Ninth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania, unless counsel agree to hold such conference by telephone and arrange and pay for a telephone conference call. If council agree to a conference call, the court shall be notified at least one day prior to the scheduled conference. The telephone number is (717) 782-3938. Three days prior to the conference, parties shall submit to the court a short agenda and description of items they wish to discuss.

2) Plaintiffs' motion to compel discovery from Defendants is GRANTED in part, DENIED in part:

(a) Plaintiffs' request for production of discovery related to fraudulent concealment is DENIED, but Defendants must produce all requested information relevant to punitive damages;

(b) Defendants shall provide all information to which Plaintiffs are entitled, whether or not it previously has been made available;

(c) Defendants shall provide specific details as specified in the accompanying memorandum to support any claim for the application of the work product doctrine or attorney-client privilege;

(d) Defendants shall comply with any discovery requests for non-privileged information within their possession, custody or control;

(e) Plaintiffs (collectively) and Defendants (collectively) shall limit their requests for admissions and interrogatories to forty (40) regarding liability issues and forty (40) related to punitive damages.

3) Defendants' motion for summary judgment as to the allegedly time-barred claims of the forty-two Plaintiffs listed in the caption above is DENIED.

4) The parties are expected to adhere to the following case management plan:

(a) The captioned case is placed on the July 1994 trial list. Trials on the July 1994 list will commence at 9:30 a.m. on Wednes-

day July 6, 1994. Counsel should note that criminal matters take priority and may delay the beginning of the civil trial list. Jury selection will be on Tuesday, July 5, 1994 at 9:30 a.m. in Courtroom No. 2, Ninth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania.

(b) The court issues this order pursuant to Rule 16 of the Federal Rules of Civil Procedure. The court has considered the views expressed by counsel at the April 2, 992 scheduling conference and in the case management plans and briefs as to how and on what schedule pretrial matters should be conducted. Therefore, *requests for extensions of the following time periods will not be granted except under exceptional circumstances and must comply with Local Rule 401.5. All requests for continuance of discovery deadlines or trial shall be signed by counsel in conformity with the Civil Justice Reform Act of 1990, 28 U.S.C. § 473(b) (3). Furthermore, all requests for extensions of the discovery deadline must be made at least thirty (30) days prior to the expiration of the discovery period.*

(c) On or before August 11, 1993, Plaintiffs and Defendants shall each choose six representative Plaintiffs for an initial trial;

(d) All fact discovery shall be completed by December 13, 1993 and shall be completed by the parties expeditiously and diligently.

(e) All expert discovery shall be completed by February 14, 1994. Parties who are having, or anticipate having, difficulty in obtaining reports from their experts shall notify the court in order that a deadline can be set for the submission and exchange of the reports in time to meet the deadline;

(f) Dispositive motions *and* supporting briefs must be filed by March 31, 1994;

(g) A pretrial conference will be held on Wednesday, June 1, 1994 at 10:00 a.m. in the Chambers of Courtroom No. 2, Ninth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania.

(h) Motions *in limine* and supporting briefs shall be filed no later than April 15, 1994;

(i) *On or before May 1, 1994, counsel for the parties shall hold the attorneys' conference required by Local Rule 408.3.* This conference shall be face-to-face unless the court, upon written request, approves another arrangement. Failure of the plaintiff to initiate the holding of the conference or the defendant to respond to such initiative in an appropriate manner may result in the imposition of sanctions, including possible dismissal of the action.

(j) Counsel who will try the case shall attend the pretrial conference unless the court, upon written request, approves the substitution of another attorney who is fully familiar with the case and has the settlement authority required by Local Rule 408.2. A copy of the Local Rules may be obtained from the Clerk of the Court by writing: Clerk of Court, Federal Building, P.O. Box 983, Harrisburg, Pennsylvania 17108.

(k) At the pretrial conference, counsel for the plaintiff shall be required to set forth the elements of the particular type of claim (or claims) being made. Counsel for the defendant shall be required to identify any legal defenses he/she expects to make. It should be noted that the court expects to hold counsel for both sides to the course they outline here unless good cause is shown for allowing additional legal theories, claims and/or defenses to be argued at trial and unless this court is apprised of these additional legal theories, claims and/or defenses in sufficient time to consider and evaluate them before trial.

(l) On or before May 16, 1994, each party shall file a pretrial memorandum in conformity with the Local Rules. Failure to timely file pretrial memoranda will result in an appropriate sanction. Fed. R. Civ. P. 16(f).

(m) Counsel are requested to file all documents in this case with the Clerk of Court, P.O. Box 983, Room 920, Federal Building, Harrisburg, PA 17108. Do not send courtesy copies directly to the court unless requested by the court.

(n) If the parties intend to use depositions at trial in place of live testimony, they shall review the depositions prior to the time of trial. If there are objections which cannot be resolved among counsel, said objections and copies of the relevant depositions shall be

submitted to the court at least fifteen (15) days prior to trial. Where counsel have failed to meet the time requirement in this paragraph, the court may, in its discretion, deem the objections withdrawn. If the depositions to be used are videotaped, a transcript must be provided to the court in advance of trial.

(o) Videotape equipment shall be set up in the courtroom prior to the commencement of trial in the morning, if its use is anticipated in the morning, or during the lunch break, if its use is anticipated in the afternoon.

(p) Whenever any civil action scheduled for jury trial is settled or otherwise disposed of in advance of the actual trial, jurors' costs, including mileage and per diem, shall be assessed equally against the parties unless the Clerk's Office at the place the trial is to be held is notified of the settlement in sufficient time to permit the Clerk to advise the jurors that their attendance will not be necessary. Notice to such Clerk's Office before 2:00 p.m. on the last business day preceding the day on which the trial of the action is to start shall be adequate for such purpose.

5) Unless otherwise directed, the parties are to follow the Middle District rules with respect to filing and briefing motions.

6) The briefing schedule for Defendants' pending motion for summary judgment on the duty issue is not changed by this order.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: June 16, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation Cases Consolidated II	: :	Civil Action No. 1:CV-88-1452
This Document Relates to the following forty-two Plaintiffs:	:	
Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart, Charlotte Evelyn Stewart	:	

MEMORANDUM

Before the court is Defendants' motion for reconsideration of a portion of this court's June 15, 1993 memorandum and order. The disputed portion of that order denied Defendants' motion for summary judgment as to the allegedly time-barred claims of the captioned forty-two Plaintiffs. Briefs on the motion for reconsideration have been filed and it is ripe for disposition.

Background

In its June 15, 1993 memorandum, this court discussed in detail the relevant history of the cases arising out of the 1979 incident at Three Mile Island (TMI) and the claims of the captioned Plaintiffs. Knowledge of that recitation is assumed in this opinion.

Discussion

I. This Court's June 15, 1993 Decision

In its June 15, 1993 memorandum, this court found that the choice of law provision in the Price-Anderson Amendments Act of 1988 (the "Amendments Act" or the "Act"), 42 U.S.C. § 2014(hh), incorporated Pennsylvania law as the applicable federal law in this case. (Slip op. at 13.) Analogizing to the construction given to similar language in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, this court concluded that, at least as to prospective actions, the Pennsylvania statute of limitations also was incorporated by the Amendments Act choice of law provision. (*Id.* at 13-14.)

However, when addressing the retroactive application of the choice of law provision to the cases before it, this court erred. In its prior memorandum, the court noted that § 11(a)(2), (now codified at 42 U.S.C. § 2210(n)(2)), Part of the Amendments Act's consolidation provision, included an explicit retroactivity clause; however, the parties did not cite and the court failed to note § 20[1] of the Act (set out as a note to

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1. Section 20 of the Amendments Act requires that "the amendments made by section 11 shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this act." Pub. L. No. 100-408 § 20, 102 Stat. 1067 (1988) (set out as a note to 28 U.S.C. § 2014).

42 U.S.C. § 2014). That section contains a retroactivity provision applicable to all amendments contained in § 11.[2] The amendments in § 11 of the Act include the definition of "public liability action" and the choice of law provision.[3] Thus, by its very terms, the statute clearly requires the retroactive application of all of the provisions of § 11, including the choice of law provision.

Failing to note the language in § 20, this court held that "the precise language of the Act does not require a finding that the choice of law provision [was] retroactive." (Slip op. at 15.) The court drew a negative inference from the fact that Congress had explicitly made the consolidation provision retroactive, but (so the court believed) had not expressed such an intent with respect to the choice of law provision. Accordingly, the court proceeded to examine the case law and legislative history of the Amendments Act. (*Id.* at 15-19.) Ultimately, the court found that Congress did not intend the statute of limitations portion of the Act to apply retroactively to bar Plaintiffs' pending cases. (*Id.* at 19.)

Because the court is now persuaded that the language of the statute is clear, the court's inquiry begins and ends there. "As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. 'If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.' " *Norfolk & Western R. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 111 S. Ct. 1156, 1163 (1991) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

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2. That error is apparent in footnote 12 of the June 15, 1993 opinion: "The consolidation provision [42 U.S.C. § 2210(n)(2)] contains an explicit retroactivity clause[.] . . . *There is no such retroactivity clause modifying the Amendments Act choice of law provision. See* 42 U.S.C. § 2014(hh)." (Slip op. at 15 n.12) (emphasis added).

3. Subsection 11 (b) of the Amendments Act included the new choice of law provision:

> The term 'public liability action', as used in section 170, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 170, and the substantive rules of decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

Pub. L. 100-408 § 11(b), 102 Stat. 1076, (now codified at 42 U.S.C. § 2014(hh)).

Inc. 467 U.S. 837, 842-43 (1984)). "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

Despite Plaintiffs' assertions to the contrary, without the erroneous negative inference the court drew in its June 15, 1993 memorandum, the court does not believe that its previous interpretation is tenable. The language of the statute clearly states that all of § 11, which includes the choice of law provision, is to be applied retroactively. There is no explicit indication in the language of the statute itself that Congress intended to carve out an exception with respect to the statute of limitations. Accordingly, the court finds that the statutory language dictates that the two year Pennsylvania statute of limitations applies to all actions arising out of the TMI incident.

Plaintiffs' arguments in support of this court's prior opinion are unavailing. First, the fact that Defendants did not cite § 20 in their prior briefs does not make the section inapplicable. The provision was an operative part of the statute passed by Congress and the court has the duty to apply the law as it is written. Second, the fact that § 20 was not codified with the substantive provisions of the Price-Anderson Act, but, instead, was set out as a note to a particular provision does not make it any less binding on this court. While Plaintiffs attempt to characterize the provision as a mere "historical note," it is, in fact, an operative part of the Public Law passed by Congress. "The United States Code was not enacted as a statute, nor can it be construed as such. It is only a prima facie statement of the statutory law. . . . If construction is necessary, recourse must be had to the original statutes themselves." *International Tel. & Tel. Corp. v. United States*, 536 F.2d 1361, 1372 (Ct. Cl. 1976) (quoting *Murrell v. Western Union Tel. Co.*, 160 F.2d 787, 788 (5th Cir. 1947)). "It is well settled that 'the Code cannot prevail over the Statutes at Large when the two are inconsistent.' " *Id.* (quoting *Stephan v. United States*, 319 U.S. 423, 426 (1943).

Finally, Plaintiffs' remaining arguments regarding the intent of Congress are not relevant, given the explicit language in § 20 of the Act. Because the language of the statute is clear, an examination of Congressional motives or purposes is neither necessary nor appropriate. *Norfolk & Western*, 111 S. Ct. at 1163; *Ron Pair Enterprises*, 489 U.S. at 241.

II. Revisiting the Remaining Issues in Defendants' Motion for Summary Judgment Regarding Allegedly Time-Barred Claims

The above analysis does not end the inquiry, however. This court's June 15, 1993 determination prematurely ended what would have been a multi-step analysis of Defendants' motion for summary judgment. Plaintiffs also oppose Defendants' motion on several other grounds.

First, Plaintiffs contend that to apply the two year Pennsylvania statute of limitations to their pending actions which were timely when they were filed would be unconstitutional. Second, Plaintiffs insist that, in order to avoid the injustice that would result from an *ex post* contraction of a statute of limitations period, Pennsylvania law would engraft a grace period onto the limitations period to allow those who relied on the longer limitations period to maintain their actions. Finally, Plaintiffs contend that the Pennsylvania actions are timely because Defendants' fraudulent concealment tolled the running of the limitations period. Defendants urge this court to adopt as its own or as the law of the case the non-final rulings of the Pennsylvania state courts which rejected Plaintiffs' fraudulent concealment argument.[4] Plaintiffs urge this court to reconsider those state court rulings.

A. The Constitutionality of the Retroactive Application of the Amendments Act Choice of Law Provision

Plaintiffs contend that the retroactive application of the shorter Pennsylvania limitations period to their pending actions violates their Fifth Amendment right to due process.[5] While this court finds the result

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4. *See* Orders: Lipsitt, J., dated July 7, 1987 (granting summary judgment against forty-two Plaintiffs); Lipsitt, J., dated Feb 20, 1987 (denying motion for reconsideration of February 20, 1987 order); Pennsylvania Superior Court, dated July 15, 1988 (affirming Lipsitt orders of February 20, 1987 and July 7, 1987). The case was removed back to federal court before appeal to the Pennsylvania Supreme Court. Accordingly, the order is not a final judgment to which the doctrine of res judicata applies. 1B *Moore's Federal Practice* ¶ 0.409 [1.-1] at III-123. *See also G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916) ("[It is] familiar law that only a final judgment is res judicata.").

5. Plaintiffs make no claim that retroactive application of the statute constitutes a taking without just compensation *See, e.g., Greyhound Food Mgmt., Inc. v. City of Dayton*, 653 F. Supp. 1207, 1208-09 (S.D. Ohio 1986), *affirmed on other grounds*, 852 F.2d 866 (6th Cir. 1988).

here unjust, it reluctantly concludes that application of the shorter limitations period does not violate due process. "Where Congress has manifested its intent in unambiguous terms, we do not think a court is free to fashion equitable exceptions for situations where it feels retroactive application would produce a manifest injustice not amounting to a violation of due process." *Grimesy v. Huff*, 876 F.2d 738, 742 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 1620 (1991) (quoting *Long v. Internal Revenue Service*, 742 F.2d 1173, 1183 (9th Cir. 1984)).

Plaintiffs base their due process claim on a line of early twentieth century Supreme Court cases which held that a legislature could not retroactively shorten a statute of limitations period to wholly deprive a party of an accrued cause of action. *See, e.g., Sohn v. Waterson*, 84 U.S. 596 (17 Wall. 596), 599 (1873); *Wilson v. Iseminger*, 185 U.S. 55, 62-63 (1902). These cases were cited in dicta in several recent Supreme Court cases. *Texaco Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982); *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 286 n.23 (1983). They have also been cited with approval in several district court cases. *Scardina v. Wood*, 649 F. Supp. 793, 796-97 (N.D. Ohio 1986); *Ferguson v. Sturm, Ruger & Co.*, 524 F. Supp. 1042, 1045-46 (D. Conn. 1981).

However, Defendants accurately point out that the cited Supreme Court cases all involved "vested rights," i.e., rights to property or to a fixed sum of money or rights based on a contract or quasi-contract. For example, in *Sohn*, the legislature retroactively attempted to shorten the statute of limitations for bringing an action to enforce a judgment; *Wilson* involved a claim to real property. *See also Block*, 461 U.S. at 286 (dispute between United States and North Dakota regarding rights to real property); *Texaco*, 454 U.S. at 527 (dispute over termination of dormant mineral rights).

Recent cases have clearly distinguished these "vested rights" cases from those involving personal injury or tort claims. In *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), the First Circuit stated that

> because [in vested rights cases] the rights had 'vested' in real property, a contract, or in a fixed sum, they were said to stand independent of the statute that created them and could not be abridged by the subsequent statute. In none of these cases was any right to a tort cause of action, or a right deriving from a tort, held to be 'vested.'

786 F.2d at 11 (internal citations omitted). *See, also, In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 989 (9th Cir. 1987), *cert. denied sub nom., Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *Grimesy*, 876 F.2d at 744; *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990). *Cf. In re TMI Litigation Cases Consol. II*, 940 F.2d 832, 861 (3d Cir. 1991), *cert. denied, Gumby v. General Public Utilities Corp.*, 112 S. Ct. 1262 (1992) (citing the above cases with approval in dismissing Plaintiffs' challenge to the retroactive application of the Amendments Act consolidation provisions).

The First Circuit went on to find that "[t]he question whether the rights asserted in plaintiff's state law causes of action are 'vested' cannot be answered by looking to see whether suit had already been filed and how far it had proceeded when Congress [enacted the statute at issue]." *Id.* at 12. Instead, the court found that "rights in tort do not vest until there is a final, unreviewable judgment." *Id.* Accordingly, the *Hammond* court found that when Congress amended the statute at issue to allow for the retroactive substitution of the United States as a defendant in place of the private parties in the suit and effectively abolished Hammond's tort action, it did not abridge any vested right. *Id.*

As the court earlier noted, the Third Circuit has cited the reasoning in these "vested rights" cases with approval. Plaintiffs' attempts to avoid the result which would follow from an application of the "vested rights" reasoning to the instant case are unpersuasive.

It is true that two relatively recent district court cases have adopted the approach suggested by Plaintiffs. *See Scardina*, 649 F. Supp. at 796-97; *Ferguson*, 524 F. Supp. at 1045-46. In both of these cases, the courts explicitly held *in tort cases* that it would be unconstitutional for a legislature to pass an act which retroactively shortened a limitations period without providing a grace period in which existing causes of action could be timely filed. However, for several reasons this court declines to follow *Scardina* and *Ferguson*.

First, it is clear that neither of these cases is binding on this court, but, rather, the cases have only the persuasive authority that their logic and reasoning command. However, neither *Scardina* nor *Ferguson* provides a significant rationale for its outcome. Instead, both merely cite the

above-mentioned vested rights cases and appear to assume that these cases are binding precedent in the tort cases before them.[6] The validity of this assumption is questionable in light of *Hammond* and similar recent cases.

Second, several recent United States Supreme Court decisions have cast further doubt on the validity of Plaintiffs' theory. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), the Supreme Court held that implied causes of action under § 10 of the Securities Exchange Act of 1934 were governed by a uniform federal statute of limitations rather than a borrowed state limitations period. Without comment but over a vigorous dissent from Justice O'Connor, the Court applied the shorter federal limitations period to the case before it. As a result, the *Lampf* plaintiffs' claims were dismissed. This happened even though their actions were timely under thirty years of binding Ninth Circuit precedent, were considered timely when filed, through four years of litigation at the District Court and Court of Appeals, and indeed, until the day the Supreme Court determined them untimely in *Lampf*. *See also James B. Beam Distilling Co. v. Georgia*, __ U.S. __, 111 S. Ct. 2439, 2447-48 (199°) ("Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The application of rules of law are not switched on and off according to individual hardship.").

While Plaintiffs attempt to distinguish *Lampf* and *Beam*, claiming that here, the court (as opposed to the legislature) changed the law, this court does not find such a distinction persuasive. While the *Scardina* court attempted to draw a similar distinction, it did not give any explanation as to why a legislature could not but a court could constitutionally deprive of his cause of action a plaintiff who had relied on forty years of binding precedent. As a practical matter, the two situations are exactly the same to the ousted litigant. The only possible explanation is to pretend that courts have finally "discovered" what the applicable law is (in effect, correcting previous error), while the legislature (the "maker of laws") actually changed the law. The court does not find this fiction persuasive or worthy of indulgence in this case. Both the court and the

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6. This may be due to the fact that both cases were decided prior to *Hammond* and the other Circuit cases noted above which distinguished tort and vested rights cases.

legislature are changing the applicable law and upsetting the expectations of the litigants, with equally disastrous results for those deprived of a cause of action.

In any event, Plaintiffs' claim also fails on another ground. This is not a case in which a single sovereign creates and later changes a limitations period. In passing the Amendments Act, Congress has not merely changed the applicable statute of limitations; instead, it has wholly abrogated a state common law tort action, putting in its place a new, distinct federal cause of action. In passing the Amendments Act:

> Congress intended to — and did — create a federal cause of action which will implicate substantive aspects of federal law.
>
> . . .
>
> After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of a nuclear incident is compensable under the terms of the Act or *it is not compensable at all.*
>
> . . .
>
> [In the Amendments Act,] Congress expressed its intention that state law provides the content of and operates as federal law.

TMI II, 940 F.2d at 854-55. Abolition of a state common law action is within the power of Congress. *TMI II*, 940 F.2d at 857-58, 860.

Yet, Congressional power in doing so is not unrestricted. "Congress must comply with due process when abolishing or substantially modifying a common law cause of action. In that sense, the right to sue is a 'species of property.' " *Hammond*, 786 F.2d at 12. At the same time, however, "an act of Congress comes to us clothed with the presumption of constitutionality, and the burden is on the plaintiff to show that it violates due process." *Id.* (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

In passing the Amendments Act, Congress was acting within its broad powers to regulate nuclear power and nuclear safety. *TMI II*, 940 F.2d at 858-59. Because Congress has acted within its acknowledged powers to regulate nuclear safety and because there is no fundamental right or suspect class at issue here, the applicable standard of review is

the "rational basis" test. *Hammond*, 786 F.2d at 13. Under this standard, in order to find the statute unconstitutional, the court must find the statute is "wholly arbitrary and irrational in purpose and effect, i.e. not reasonably related to a legitimate congressional purpose." *Id.* (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77 (1980); *Vance v. Bradley*, 440 U.S. 93, 97-98 (1979). Plaintiffs have the burden of proof on this issue. *Id.; TMI II*, 940 F.2d at 861.

The overall scheme of the Amendments Act and its general retroactive application to TMI cases was clearly upheld by the Third Circuit in *TMI II*. "Given the goals underlying the Amendments Act, we believe that its provision for retroactivity was rationally directed to a legitimate federal concern. . . . [P]laintiffs have failed to meet their burden of showing that the Amendments Act was arbitrary and irrational in purpose and effect." 940 F.2d at 861.

However, Plaintiffs claim that the retroactive application of the statute of limitations in their particular cases presents a distinct issue not raised in the prior Third Circuit appeal. They claim that this portion of the statute, as applied to their claims, is not rationally related to any legitimate Congressional purpose. This court agrees that the issue was not addressed in the prior appeal, but reluctantly concludes that, given the limited nature of rational basis review, the statute passes constitutional muster.

In passing the Amendments Act, Congress had several legitimate purposes in mind. Congress intended to conserve the limited available funds under the Price-Anderson scheme and to use these funds to compensate victims of nuclear incidents, including the TMI incident, in a fair and efficient manner. In this case, the court cannot say that subjecting all alleged victims to a single, uniform statute of limitations, the period of the state in which the accident occurred, was unreasonable. Congress may have concluded that those individuals who filed an action within two years of the TMI incident were more likely to have real or substantial injuries than those who filed much later in another forum.

On the particular facts of this case, the court cannot conclude that such a judgment was wholly irrational or arbitrary. The captioned Plaintiffs are all Pennsylvania residents who allegedly were injured in Pennsylvania by primarily Pennsylvania citizens. This court cannot say that it

is wholly irrational for Congress to have concluded that most Plaintiffs with meritorious claims would not have delayed filing their claims in reliance upon the limitations period of a distant forum.

Accordingly, the court finds no merit to Plaintiffs' constitutional challenge to the Amendments Act. Therefore, all cases (those filed in state or federal court in Mississippi and those filed in Pennsylvania) are governed by the Pennsylvania statute of limitations.

B. Pennsylvania Law and Grace Periods

Plaintiffs claim that, even if the United States Constitution does not mandate that their actions be deemed timely, the Pennsylvania law incorporated by the Amendments Act requires such a result. They assert that, to the extent that the Amendments Act mandates the incorporation of state law, it mandates the incorporation of the whole of state law. Plaintiffs claim this incorporated law includes a string of Pennsylvania cases which hold that, in order to pass constitutional muster, a statute which retroactively shortens the applicable limitations period for accrued causes of action must provide a grace period in which to file existing claims. *See Commonwealth ex rel. Kelley v. Brown*, 193 A. 258, 261 (Pa. 1937); *Philadelphia B. & W. R.R. Co. v. Quaker City Flour Mills Co.*, 127 A. 845, 846-47 (Pa. 1925); *Bowden v. Philadelphia, W. & B. R.R. Co.*, 46 A. 843, 844 (Pa. 1900); *Rodenbaugh v. Philadelphia Traction Co.*, 42 A. 953, 954 (Pa. 1899); *Korn v. Browne*, 64 Pa. 55, 58 (1870); *Wilson v. Central Penn Industries, Inc.*, 452 A.2d 257, 260 (Pa. Super. 1982); *Crisante v. J.H. Beers, Inc.*, 443 A.2d 1150, 1153 (Pa. Super. 1982); *Ferki v. Frantz's Transfer Co.*, 31 A.2d 586, 587-88 (Pa. Super. 1943); *Byers v. The Pennsylvania R. Co.*, 18 Pa. C. 187, 192 (Allegheny Co. 1896).

The majority of these cases are clearly distinguishable. First, a number of these cases involved actions to enforce "vested rights," as opposed to tort actions.*See, e.g., Brown*, 193 A. at 261 (statute must provide avenue for enforcement of *judgments* issued by court); *Quaker City Flour*, 127 A. at 846-47 (action on contract rights for a fixed sum claimed due); *Korn*, 64 Pa. at 58 (abrogation of contract rights to ground rents due under contracts not enforced for more than twenty years).

Second, most of the cases involve the construction of the United States Constitution. *Brown*, 193 A. at 261 (violation of 14th Amendment

due process clause)[7]; *Quaker City Flour*, 127 A. at 846-47 (same); *Wilson*, 452 A.2d at 260 (relying on cases construing violations of United States Constitution); *Crisante*, 443 A.2d at 1153 (same); *Ferki*, 31 A.2d at 587-88 (same). A federal court need not defer to a state court interpretation of federal law or the United States Constitution. *Hawkman v. Parratt*, 661 F.2d 1161, 1166 (8th Cir. 1981).

The remaining cases, *Bowden*, 46 A. at 844; *Rodenbaugh*, 42 A. at 954; *Byers*, 18 Pa C. at 192, are not persuasive. These cases arguably stand for the proposition that the Pennsylvania Constitution requires the grace period that Plaintiffs seek. On closer examination, however, only *Byers*, the 100 year old Common Pleas Court case, actually stands for this proposition.

In *Byers*, a Common Pleas judge rejected the distinction between actions on a contract or judgment (vested rights cases) and tort actions. The *Byers* court determined that retroactive deprivation of a tort action by a legislative act shortening the statute of limitations would violate the Pennsylvania Constitution. "On both principle and authority, we conclude that a Constitution which forbids the taking of property, save by due process of law, forbids the summary taking away of *all* remedy for the recovery of damages for personal injury." *Byers*, 18 Pa. C. at 192 (emphasis in original). While this case has a certain common sense and sympathetic appeal, this court does not believe that it accurately states the prevailing view of most courts or the view likely to be taken today by the Pennsylvania Supreme Court.

The position of the court in this case is similar to that of a federal court in a diversity action. In such cases, although the decisions of lower state courts are evidence of state law and should be accorded proper regard, they are not binding on a federal court. The task of a federal court is "to interpret and apply the law of [the forum state] as [it] believe[s] the [forum state's] Supreme Court would. *Rawson v. Sears, Roebuck & Co.*, 822 F.2d 908, 910 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). This court does not believe that the cited Pennsylvania

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7. The *Brown* court also found a violation of the contracts clauses of the Pennsylvania and United States Constitutions. However, because there clearly is no contract involved in this case, this finding is not relevant.

Supreme Court cases constitute binding precedent or that they are indicative of how that court would rule today.

First, *Bowden* and *Rodenbaugh* do not constitute binding precedent because they mention the requirement of a grace period only in dicta, after finding that the litigants before them had waited too long to meet any potentially applicable period. Second, the cases are not particularly persuasive, in that, neither explicitly found any right in the Pennsylvania Constitution or even mention that document. Rather, they merely cite *Byers* without any explanation or discussion for the proposition that a grace period is required. From this cursory mention of the grace period requirement and *Byers* it is not even clear that the courts believed that such a right existed under the state (as opposed to the federal) constitution. Finally, *Bowden*, *Rodenbaugh*, and *Byers* were decided nearly one hundred years ago. Due to the developments in property law since that time, this court is not persuaded that the Pennsylvania Supreme Court would find such a right today.

A state court is free to interpret its own state constitution to afford its citizens protections broader that those available under the United States Constitution. However, in our federal system, it is not the role of a federal court to extend these state constitutional remedies. Plaintiffs essentially seek to have this court find a substantive state right under the Pennsylvania Constitution based on two ninety year old Pennsylvania Supreme Court cases which, in dicta, cite a Common Pleas Court decision. To do so, this court would have to abandon all notions of comity and federalism. Thus, without strong precedent from Pennsylvania courts, it would be improper for this court to read into the Pennsylvania Constitution protections much broader than those afforded under the United States Constitution.[8]

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8. Without citing any specific textual provision, Plaintiffs also imply that Pennsylvania statutory law provides a basis for establishing a grace period. The evidence appears to be to the contrary. Pennsylvania law has not taken a lenient approach toward extending statutes of limitations. For example, the Pennsylvania borrowing statute, applicable to claims arising outside of the Commonwealth, adopts the *shorter* of the potentially applicable limitations periods. 42 Pa. Cons. Stat. Ann. § 5521(b). The purpose of this statute was explained by the Superior Court of Pennsylvania: "Pennsylvania's borrowing statute unequivocally [evinces] the legislative intent to prevent a plaintiff who sues in Pennsylvania from obtaining greater rights than those available in the state where the cause of action arose." *Gwaltney v. Stone*, 564 A.2d 498, 503 (Pa. Super. 1989).

Accordingly, this court finds that Pennsylvania law does not provide an independent basis for engrafting a grace period onto the applicable limitations period.

C. The Effect of the Pennsylvania State Court Judgment

Prior to removal back to this court in 1987, Judge Lipsitt of the Dauphin County Court of Common Pleas granted summary judgment against the instant Plaintiffs in their Pennsylvania actions based on their failure to file within the two year limitations period. Judge Lipsitt rejected Plaintiffs' claims that Defendants' fraudulent concealment of certain facts regarding the 1979 incident tolled the running of the limitations period. Judge Lipsitt's rulings were affirmed by the Pennsylvania Superior Court but removed to this court before the period for filing for allocatur had expired.

This court must now determine the effect of those state court rulings on Plaintiffs' Mississippi and Pennsylvania actions.

1. District Court Review of the Pennsylvania Judgment

Removal of a case from state to federal court during the pendency of an appeal is relatively unusual. *Reilly v. Waukesha County, Wisconsin*, 993 F.2d 1284, 1287 (7th Cir. 1993). Generally, removal can occur only within thirty days of service of the defendant with the first pleading which sets forth facts or allegations providing a ground for removal. 28 U.S.C. § 1446(b). Certain removal provisions explicitly require removal of an action before trial of a matter. *See, e.g.*, 28 U.S.C. 1446 (c)(1) (requiring removal in federal officer criminal prosecutions to take place before trial).

However, several recent statutes have allowed for removal of certain actions at any time prior to a final judgment. *See, e.g.*, Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1819(b)(2) (FDIC can remove any non-final action from state court within ninety days after taking over insolvent institution). Courts and litigants faced with actions removed during appeal have encountered substantial difficulties, both practical and theoretical.

Practically, courts have struggled to determine whether the district court should conduct its own review of the state court determination or

immediately send the matter to the Court of Appeals for review. If the court reviews the matter, it must determine the appropriate procedural vehicle and substantive standard of review. A court must decide whether it should act as a trial court would in reconsidering its own non-final determination, *see Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1252 (11th Cir. 1988); *Jackson v. American Sav. Mortg. Corp.*, 924 F.2d 195, 198-199 (11th Cir. 1991), or whether it should effectively act as an appellate court to the state tribunal, *In re Meyerland Co.*, 960 F.2d 512, 520 (5th Cir. 1992) (rejecting such an approach).

Courts also have struggled to determine the appropriate procedural peg on which to hinge their power to review such a decision. Where they have done so, courts have generally reviewed the decisions under either Federal Rules of Civil Procedure 59 or 60 or as a motion for reconsideration. *See, e.g., Jackson*, 924 F.2d at 199 (review under Rule 59 proper); *Norris v. Merritor Fin. Group, Inc.*, 1993 WL 183984 at *1 (E.D. Pa. 1993) (without specifying one standard, broadly stating that it would review under the three standards).

Theoretically, courts have struggled to balance several concerns. First, several courts have stated that the specter of a federal district court sitting in appellate review of a state appellate court would not comport with traditional notions of comity and the appropriate relationship between the parallel federal and state courts in our federal system of government. *Federal Deposit Ins. Corp. v. Sellards*, 731 F. Supp. 1300, 1301 (N.D. Tex. 1990). *Cf. Meyerland*, 960 F.2d at 520 (noting that such an approach would unnecessarily raise "complex constitutional and jurisdictional issues"). At the same time, other courts have objected to requiring district courts to "rubber stamp" state court judgments in order to effectively bring the matter to the Court of Appeals for review. *Meyerland*, 960 F.2d at 524 (in dissent) (rejecting the suggestion that Congress would require district court to "rubber-stamp" determination of the state court); *Jackson*, 924 F.2d at 199 (because federal appeals courts can only review decisions of federal district courts, district court must conduct its own review of state court decision to make reality the "legal fiction" that state court judgment is federal judgment).

In sum, the Circuits have split on the proper approach to review of a state court judgment removed during appeal. The Eleventh Circuit, before allowing an appeal, has required a district court, *on motion of a*

party, to first review the state court judgment. *Jackson*, 924 F.2d at 198-199; *Resolution Trust Corp. v. Bayside Developers*, 817 F. Supp. 822, 827 (N.D. Cal. 1993). *See also Norris*, 1993 WL 183984 at *2 (court reviewed and adopted non-final state court judgment in employment discrimination action removed after disposition on merits). The Fifth Circuit, on the other hand, has held that the district court should "take the state judgment as it finds it, prepare the record as required for appeal, and forward the case to the appellate court for review." *Meyerland*, 960 F.2d at 520; *Walker v. Federal Deposit Ins. Corp.*, 970 F.2d 114, 121 (5th Cir. 1992); *In re 5300 Memorial Investors, Ltd.*, 973 F.2d 1160, 1162 (5th Cir. 1992). *Cf. Reilly*, 993 F.2d at 1287.

This court is persuaded that the Fifth Circuit approach is more fitting, in that it respects the principles of federalism and comity put into play when a federal district court is required to review the decisions of a state appeals court. Accordingly, this court adopts the Feb. 20, 1987 and July 7, 1987 decisions of Judge Lipsitt of the Dauphin County Court of Common Pleas and the July 15, 1988 decision of the Pennsylvania Superior Court. *Meyerland*, 960 F.2d at 520; *Walker*, 970 F.2d at 121; *5300 Memorial Investors*, 973 F.2d at 1162. *Cf. Norris*, 1993 WL 183984 at *2 (adopting as its own decisions of Pennsylvania trial and appellate courts to "place case in the procedural posture necessary for the Third Circuit Court of Appeals to entertain an appeal by Plaintiffs").

In this case, however, as a practical matter, it makes no difference which approach this court adopts. Plaintiffs will fair no better under the Eleventh Circuit approach because they have taken no action in this court to preserve their claims since the actions were removed here. In *Jackson*, the Eleventh Circuit held that a district court "should give a dissatisfied party ten days from the removal date to file [a Rule 59 motion to alter or amend judgment]." 924 F.2d at 199 n.9.

In this case, Plaintiffs have yet to file such a motion. Plaintiffs' actions were removed to this court in August 1988 during the pendency of their state appeal. At that time, Plaintiffs took no action to preserve their claims in federal court. They neither filed a notice of appeal nor requested reconsideration or an amendment of judgment from this court. Plaintiffs attempt to excuse their failure to act because "after removal the most pressing question applicable to all of the plaintiffs . . . was whether the grant of federal jurisdiction under the Amendment Act

was constitutional." (Plaintiffs' Opposition Brief at 36.) Even assuming that this is true, the jurisdictional issue was definitely resolved by March of 1992, when the United States Supreme Court denied Plaintiffs' request for a writ of certiorari and the cases were transferred or removed back to this court.

Again Plaintiffs took no action to preserve their claims. Even if the court were to construe their opposition to Defendants' motion for summary judgment as a Rule 59 motion, it is still untimely. The opposition brief was filed on August 28, 1992, some five months after the cases were consolidated in this court. Accordingly, in the alternative, this court finds that Plaintiffs have waived their right to review of the state court decision in this court.

Plaintiffs claim that they should be treated as though they have three separate causes of action: a Mississippi federal action, a Mississippi state court action, and a Pennsylvania action. If such were the case, then technically the Pennsylvania state court judgments would be binding only in the Pennsylvania actions because the Pennsylvania judgment is not yet final. This is true even though each case presents an identical statute of limitations issue. In an overabundance of caution, the court will treat Plaintiffs as each having three separate causes of action. However, because the Mississippi cases present the identical issue disposed of in a Pennsylvania action, the court will stay the Mississippi actions pending disposition of the appeal of the Pennsylvania action. Such an appeal should definitively resolve the Mississippi cases one way or the other.

The court believes that the issues with respect to the instant Plaintiffs' claims are sufficiently distinct that they need not await the resolution of the other two thousand claims in the case. Accordingly, the court will order that judgment immediately be entered against Plaintiffs. In the event that this court is found to be in error, on remand, the instant Plaintiffs' claims can be tried with the remaining TMI claims.

An appropriate order will be issued.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: August 16, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation	:	Civil Action No.
Cases Consolidated II	:	1:CV-88-1452
	:	
This Document Relates to the	:	
following forty-two Plaintiffs:	:	
	:	
Dorothy L. Aldrich, Faith Alleman,	:	
Philip Angeli, Michael J. Anoka,	:	
Catherine J. Balinosky, Regis E. Beasley,	:	
Louis Borda, Betty M. Boylestein,	:	
George L. Boylestein, Shirlean	:	
Burhanan, Ruth Butler, Frank J. Caka,	:	
Susan H. Chynoweth, Daniel M.	:	
Chynoweth, Catherine Costello, John T.	:	
Costello, Martha A. Costik, Richard N.	:	
Costik, Mary Margaret Earhart, Edward	:	
T. Ferguson, Marco G. Glad, Jr., Linda	:	
I. Glad, Barbara Grandon, Helen M.	:	
Hank, Edward John Hertzog, Marie H.	:	
Hertzog, Dianne Hindermyer, George	:	
Vance Hitz, Marjorie B. Hitz, Carol C.	:	
Hoch, Louis A. Hoch, Estate of Robert	:	
P. Holmes, Thelma M. Nagy, Barry	:	
Obercash, Georgeann Pristello, James J.	:	
Pristello, Jaime Lynn Pristello, Kenneth	:	
R. Snyder, Patricia Southard, Joseph F.	:	
Stewart, Charlotte Evelyn Stewart	:	

ORDER

In accordance with the accompanying memorandum, It IS HEREBY ORDERED THAT:

(1) Defendants' motion for reconsideration of a portion of this court's June 15, 1993 order is GRANTED;

(2) That portion of this court's June 15, 1993 order which denied Defendants' motion for summary judgment with regard to time-barred claims is VACATED;

(3) Defendants' motion for summary judgment with respect to Plaintiffs' time-barred claims is GRANTED in part;

a. The court adopts the reasoning of the Feb. 20, 1987 and July 7, 1987 decisions of Judge Lipsitt of the Dauphin County Court of Common Pleas and the July 15, 1988 decision of the Pennsylvania Superior Court;

b. In the alternative, this court finds that Plaintiffs have waived their right to review of the above decisions in federal court.

c. Summary judgment is granted in favor of Defendants with regard to claims arising out of the captioned Plaintiffs' Pennsylvania cases, while claims arising out of their Mississippi actions are stayed pending either expiration of the period of appeal or disposition of any appeal of this decision.

(4) The clerk of court is directed to immediately enter judgment in accordance with this order.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: August 16, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation Cases Consolidated II	: :	Case Number: 1:CV-88-1452
This Document Relates to the following forty-two Plaintiffs:	: :	
Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart, Charlotte Evelyn Stewart	:	

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is hereby granted in favor of Defendants with regard to claims arising out of the captioned Plaintiffs' Pennsylvania cases, while claims arising out of their Mississippi actions are stayed pending either expiration of the period of appeal or disposition of any appeal of this decision.

Date: August 16, 1993

LANCE S. WILSON
Clerk

GEORGE T. GARDNER
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation Cases Consolidated II	: :	Civil Action No. 1:CV-88-1452
This Document Relates to the following forty-two Plaintiffs:	: :	
Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart, Charlotte Evelyn Stewart	:	

MEMORANDUM

Before the court is Plaintiffs' motion for reconsideration of this court's order of August 16, 1993. Briefs have been filed and the motion is ripe for disposition.

Background

In previous memoranda, this court has discussed the background of this case and the instant dispute. *See* June 13, 1993 and August 16, 1993 orders; *see also In re TMI Litigation Cases Consol. II*, 940 F.2d 832, 861 (3d Cir. 1991), *cert. denied sub nom. Gumby v. General Public Utilities Corp.*, 112 S. Ct. 1262 (1992). Familiarity with these prior decisions is presumed here.

In brief, the forty-two Plaintiffs whose claims are the subject of the instant motion each filed three nearly identical actions, one each in Pennsylvania state court, Mississippi state court and federal district court in Mississippi. By orders dated February 20, 1987 and July 6, 1987, Judge Lipsitt of the Dauphin County, Pennsylvania Court of Common Pleas granted summary judgment against each Plaintiff in his or her respective Pennsylvania action. The judgment by the Common Pleas court was affirmed by the Pennsylvania Superior Court. However, before the period for appeal to the Pennsylvania Supreme Court expired and before the state judgment became final, the cases were transferred to this court.

Following transfer to this court, Defendants moved for summary judgment against the forty-two Plaintiffs, alleging that all of their claims were time-barred. In a June 13, 1993 memorandum and order, this court denied Defendants' motion for summary judgment, concluding that parallel actions filed in Mississippi by the forty-two Plaintiffs were timely. Upon reconsideration, based on statutory authority not previously brought to the court's attention, this court vacated that portion of its June 13, 1993 memorandum and order relating to the allegedly time-barred claims. (*See* August 16, 1993 memorandum and order.) Based on the newly cited statutory authority, the court concluded that the Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2011 *et seq.*, mandated application of Pennsylvania's statute of limitations rules. Under these rules, Plaintiffs' claims were time-barred. The court found that retroac-

tive application of this rule did not violate either the United States or Pennsylvania Constitutions.

Finally, the court addressed the effect of the prior state court judgment rendered against the forty-two Plaintiffs. Initially, the court noted that post-judgment transfer of a case was highly unusual and that there was a split in the circuits as to the appropriate procedure in the district court after such a transfer. Following the approach set forth by the Fifth Circuit in *In re Meyerland Co.*, 960 F.2d 512, 520 (5th Cir. 1992), this court adopted the ruling of the state court, permitting the court of appeals, rather than this court, to review the merits of the underlying decisions of the state trial and appellate courts. In the alternative, this court concluded that Plaintiffs' failure to challenge the state court judgments upon transfer back to this court constituted a waiver of their right to review in this court. Therefore, the court entered judgment against the forty-two Plaintiffs.

Plaintiffs have moved for reconsideration of the final portion of this court's order, namely, its conclusions regarding the effect of the prior state court judgments on Defendants' underlying motion for summary judgment.

Discussion

I. Plaintiffs' Motion for Reconsideration[1]

Plaintiffs' motion for reconsideration challenges this court's August 16, 1993 order on two grounds. First, detailing various actions they have taken during the instant litigation, Plaintiffs contend that this court's alternative finding of waiver was erroneous. Second, Plaintiffs argue that this court should not have adopted the state court rulings because the intervening decision of the Pennsylvania Superior Court in *Marinari v. Asbestos Corp.*, 612 A.2d 1021 (Pa. Super. 1992), changed the applicable law and undermined the reasoning of the state court rulings. Before addressing these issues, the court must note a recent, relevant legal development.

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1. By letter dated October 20, 1993, Plaintiffs requested oral argument on the instant motion. At this time, the court does not believe that argument is necessary and, therefore, Plaintiffs' request will be denied.

When this court made its August 16, 1993 ruling, the Third Circuit had not yet addressed the proper procedure for a district court faced with transfer of a case after the entry of a judgment in state court. The circuits addressing the subject were split. On the one hand, the Eleventh Circuit mandated review by the district court in the first instance. *Jackson v. American Sav. Mortg. Corp.*, 924 F.2d 195, 198-199 (11th Cir. 1991). Only after the aggrieved party had presented its challenges to the district court and the district court had determined for itself the merits of those claims would the appellate court hear the appeal. *Id.* On the other hand, as noted above, the Fifth Circuit approach required the district court to adopt the state court judgment, facilitating federal review in the first instance by the court of appeals. *In re Meyerland Co.*, 960 F. 2d 512, 520 (5th Cir. 1992). In its August 16, 1993 decision, this court adopted the *Meyerland* approach.

One day after that decision, the Third Circuit addressed this issue for the first time, adopting supervisory rules and procedures to be employed by a district court to which a case is transferred after the entry of judgment in state court. *Resolution Trust Corp. v. Nernberg*, 3 F.3d 62, 68-69 (3d Cir. August 17, 1993). The Third Circuit approach is a practical, middle ground between the views adopted by several other circuits:

> In all cases removed to the district court after judgment has been entered by a state court, the parties may, within thirty days of the date the case is docketed in the district court, file motions to alter, modify, or open the judgment. After briefing or argument as it deems advisable, the district court should enter an order granting or denying such relief.
>
> If the motion is denied or if the parties fail to file motions within the thirty-day period, the district court should enter an order adopting the state court judgment as its own. Parties then desiring to appeal shall observe the appropriate federal rules of procedure as applicable to a judgment of the district court.
>
> . . .
>
> We emphasize that motions directed to the district court shall not require it to act as an appellate court. Rather, the motions that we envision are those in the nature of proceedings under

> Federal Rule of Civil Procedure 59(e) (motion to alter or amend judgment) or those seeking to reopen to allow Resolution Trust to present issues not previously raised in the state litigation.

3 F.3d at 68-69 (footnote omitted).

In *Nernberg*, the Third Circuit carefully balanced several important principles. First, the court did not intend the district court to sit as an appellate court in review of a state court judgment. Instead, the Third Circuit expected the district court to address motions typically addressed by district courts, such as those under Federal Rule of Civil Procedure 59(e) to alter or amend judgment, or motions requiring the district court's fact-finding capability or which would benefit from district court analysis in the first instance, such as a motion to open judgment to assert, i.e. defenses or claims not previously available. *Id.* at 69.

Second, the Third Circuit adopted a flexible, pragmatic approach which would not require the district court to expend "its limited resources on a case where the proceedings are complete and in condition for final appellate review." *Id.* at 68. At the same time, the district court is permitted an initial review of cases in which factual issues or new claims otherwise might require a remand to the district court. *Id.* Such flexibility permits the efficient use of the resources of both the district and appellate courts. *Id.*

This court believes that the Third Circuit would apply its flexible, efficiency-oriented *Nernberg* approach in this case. While this is not an RTC case, the *Nernberg* supervisory rules are not on their face limited to the RTC context. Further, the problems presented by the instant post-judgment transfer situation are similar to those presented in *Nernberg* and other RTC cases.

Upon further review of the events of this case and in light of the principles articulated in *Nernberg*, this court is not inclined to adhere to its prior alternative finding of waiver. (*See* August 16, 1994 memorandum at 24-25.) First, applying *Nernberg*, it is clear that Plaintiffs have not waived their right to all federal review. *Nernberg* contemplates the district court addressing motions akin to post-trial motions. A party need not file a post-trial motion in order to preserve its right to appeal. *Trout v. Pennsylvania R. Co.*, 300 F.2d 826, 829-30 (3d Cir. 1962); *Chicago*

College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1135, 1349-50 n. 24 (7th Cir. 1983); 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2818, at 113 (1973). Further, under *Nernberg*, a party need not commence an appeal until the district court adopts the state court judgment. In this case, that did not occur until this court's August 16, 1993 order. Thus, Plaintiff's timely motion for reconsideration has preserved their right to appeal.

In addition, *Nernberg* permits a litigant thirty (30) days from the date a case is docketed (as opposed to the normal ten days) to file a Rule 59(e) or other permissible motion. 3 F.3d at 69. Plaintiffs clearly did not act within ten days of either the 1988 transfer of the state judgments to this court or the March 10, 1992 docketing of the case in this court after the United States Supreme Court denied *certiorari* with respect to Plaintiffs' jurisdictional challenge. However, within thirty days of both of these events, Plaintiffs did take steps which, under the circumstances of this case, the court finds sufficient to preclude a finding of waiver.[2]

Finally, the court does not believe that any purpose would be served by a finding of waiver of review here because, if the court of appeals reached the issue of the validity of the previous state court ruling, it likely would remand to this court to supplement the record and possibly for an initial determination of the "*Marinari* claims."[3] Accordingly, the court will reconsider its previous ruling on the effect of the prior Pennsylvania judgments.

II. Scope of Review of Pennsylvania Judgments

While *Nernberg* permits the court to examine issues raised by a party dissatisfied with a transferred non-final state judgment, the case also clearly indicates that a district court is not expected to act in a purely

2. Given the uncertainty regarding the transfer of post-judgment cases and the nature of Plaintiffs' jurisdictional challenge, the court does not view their failure to act upon transfer to this court in 1988 as a waiver. After the most recent transfer to this court, Plaintiffs raised the limitations issue in their April 1, 1992 proposed case management brief and at the April 2, 1992 case management conference. Both of these were within thirty days of when the case was docketed in this court after the denial of *certiorari*. Finally, at this point, the court is not inclined to penalize Plaintiffs for not having the prescience to raise the limitations issue through the precise procedural vehicle authorized by the Third Circuit more than a year after Plaintiffs had to act.

3. *See* discussion in Section II., *infra*.

appellate capacity. The *Nernberg* case was transferred to federal court after judgment was entered by the state trial court but prior to a ruling by any state appellate tribunal. 3 F.3d at 64. In contrast, in the instant action, the Pennsylvania Superior Court had rejected Plaintiffs' claims on appeal and affirmed the judgment of the trial court prior to the transfer to this court. Where a state appellate tribunal already has addressed the parties' contentions, there is a substantial chance that a district court later addressing those very claims would be acting in a purely appellate capacity. Accordingly, the court does not intend to revisit issues already decided by the Pennsylvania Superior Court. Thus, if any of the forty-two Plaintiffs now before the court do not have *Marinari* claims, this court believes that the proper course is to adopt the decision of the state court with respect to those Plaintiffs, permitting review of their claims by the Third Circuit rather than this court.

However, all parties concede that *Marinari v. Asbestos Corp.*, 612 A.2d 1021 (Pa. Super. 1992), constitutes a change in Pennsylvania law from that which existed at the time the judgment against Plaintiffs was rendered in the Dauphin County Court of Common Pleas and affirmed by the Pennsylvania Superior Court.[4]

When the Pennsylvania courts ruled on Plaintiffs' claims, Pennsylvania was a "one-disease" state. In simple terms, this meant that the statute of limitations for any claim arising out of exposure to a toxic substance began to run when the Plaintiff (1) knew or should have known that he or she had an abnormal or harmful condition and (2) knew or should have known that the condition was caused by the conduct of the defendant. *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493 (Pa. Super. 1984) *(en banc)*.

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4. Plaintiffs also claim that *Martin v. Lancaster Battery Co., Inc.*, 606 A.2d 444 (Pa. 1992), constitutes a relevant change in Pennsylvania law. In *Martin*, the Pennsylvania Supreme Court held that the exclusivity provision of Pennsylvania's Workmen's Compensation Act did not bar an employee's claim against his employer for injuries caused by the employer's fraudulent concealment and misrepresentations regarding the results of medical tests on the employee. *Id.* at 447-48. The court does not believe that the *Martin* court's construction of the worker's compensation act has the broad implications Plaintiffs believe should be drawn from it; rather, the court believes that the case is basically what it purports to be—a construction of a portion of the worker's compensation statute.

For example, under the "*Cathcart* rule," a plaintiff who discovered that he had asbestosis in 1975 was required to sue for all possible present and future claims arising out of his asbestos exposure within two years of the time he gained this knowledge (i.e., by 1977); otherwise, any claim against the party responsible for his exposure was barred. *Id.* at 506. Thus, if Plaintiff did not sue for damages for his asbestosis condition, a later suit based on pleural thickening, a wholly separate asbestos-related disease, would be barred if not brought by 1977. This was true even if the pleural thickening did not manifest itself until after limitations period expired in 1977. *Id.*

However, after transfer of the instant actions to this court (and subsequent to Defendants' July 9, 1992 motion for summary judgment against Plaintiffs in this court), the Pennsylvania Superior Court overruled *Cathcart* and announced that, henceforth, Pennsylvania would be a "two-disease" state. In essence, under *Marinari*, the statute of limitations on a claim for a separate and distinct disease related to a prior toxic exposure would not begin to run until the later condition actually manifested itself and the injured party knew or should have known of the condition and its causal relation to the source. At that point, a new limitations period for the new condition began to run.

Plaintiffs assert that at least some of the instant Plaintiffs have *Marinari* second-injury claims. However, the backdrop against which the Court of Common Pleas and the Pennsylvania Superior Court addressed Defendants' motions for summary judgment was the then-reigning *Cathcart* rule. Thus, the Pennsylvania Superior Court summarily rejected Plaintiffs' second-injury claims in two sentences in a footnote, indicating that Pennsylvania followed the single-injury rule. *In re TMI Consolidated Cases II*, No. 445 Harrisburg 1987, slip op. 3 n.3. (Pa. Super. July 15, 1988) (attached to Defs.' July 9, 1992 Mot., Ex. C).

Because the state courts never addressed Plaintiffs' second-injury claims under the current law, this court is persuaded that *Nernberg* dictates review in this court of Plaintiffs' *Marinari* claims before adopting the state court judgment. However, this review is complicated by the odd procedural posture of this case.

Defendants largely rely on these state judgments to support their summary judgment argument.[5] However, in spite of Plaintiffs' arguments in favor of a change in Pennsylvania law to a two-disease rule,[6] it was the prior one-disease rule which framed the arguments, relevant evidence and pleadings and ultimately prevailed in the Pennsylvania state court review of Plaintiffs' claims. *Id.* (adopting Defendants' argument at App., Vol. IV at 1208a-1210a and applying *Cathcart* rule). Because of this, the state courts did not have to differentiate which claimed injuries were barred because they did not meet the requirements of the discovery rule or fraudulent concealment doctrine, as opposed to those separate injuries which were barred because of the single-injury rule.

In the briefs now before the court, the parties cite portions of medical records, indicating the various injuries certain Plaintiffs claim to have suffered. However, for some Plaintiffs, there is no evidence whatsoever in the record. Further, neither party has introduced any expert evidence in support of their claims that the various injuries are either related or separate and independent of one another. Under these circumstances, the court is not persuaded that it has an adequate basis to determine the validity of any *Marinari* claims.

At this point, however, the court does not intend to order further briefing and/or wholesale expert discovery and the generation of expert reports with respect to each of the forty-two Plaintiffs. Rather, for purposes of advancing the ultimate resolution of the whole of the TMI litigation, at this point, the court intends to proceed as follows.

First, the court will give Plaintiffs 30 days to notify the court which of the instant forty-two Plaintiffs have a good faith basis for the assertion of a *Marinari* second-injury claim and the nature of that claim.[7] If any of

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5. This is understandable given that they initially filed their motion several weeks before *Marinari* was decided.

6. *See, e.g.*, Appendix to Defendants' July 9, 1992 motion for summary judgment, Vol. I at 84a-85a; Vol. IV at 1138a-1144a.

7. The court expects Plaintiffs and their counsel to undertake this effort in good faith and with due diligence. If the court later determines that Plaintiffs did not have a good faith basis to assert a *Marinari* claim, Plaintiffs and/or their counsel may be subject to sanction.

the forty-two Plaintiffs do not have *Marinari* claims, the court will adopt the judgment of the state court with respect to those Plaintiffs, allowing them to take an immediate appeal of that judgment. The court will hold all other limitations claims in abeyance pending a ruling by the Third Circuit on that appeal.

If all of the forty-two Plaintiffs claim to have *Marinari* injuries, the court will permit Defendants sixty days to conduct discovery with respect to the forty-two Plaintiffs and their second-injury claims. After the period for discovery, the court will give Defendants thirty days to file a motion for summary judgment with respect to a maximum of four Plaintiffs of Defendants' choice. The motion should be supported by expert affidavits. If Defendants prevail on their motions, Plaintiffs will be permitted to appeal those determinations. If Defendants do not prevail, the court will review matters to determine whether further similar motions likely would result in a final judgment.

While the court recognizes that the foregoing procedure is somewhat unusual, it believes that it is an appropriate exercise of this court's case management authority. The primary rationale for the above procedure is that it will expedite appellate review of the instant motions. Such review, at a minimum, will provide guidance regarding the applicable standards for statute of limitations claims. Depending on the outcome of any appeal, it may eliminate the need to take fact and expert discovery and to file and brief motions which ultimately are unnecessary.

Defendants have indicated that they may assert a statute of limitations defense against Plaintiffs other than the forty-two now before the court. The court's procedure will put all the issues raised by Defendants' motions for summary judgment before the Third Circuit. Prior to reaching issues related to the Pennsylvania judgments, this court made a number of legal determinations with respect to the applicable statute of limitations. To be perfectly frank, while this court believed the ultimate rulings to be legally correct, it found the legal issues to be close and the substantive results to be somewhat unjust.

There is a chance that the Third Circuit will disagree with this court's legal conclusions. In the context of this litigation, such a possibility is significant. If, for example, the Third Circuit found that the Mississippi limitations period applied to the claims filed there, summary judg-

ment motions with respect to only the Pennsylvania actions would appear to serve little practical purpose, as the nearly identical Mississippi actions would remain. If the Third Circuit agrees with this court's analysis, the legal standards for further statutes of limitations motions will be known and they can proceed accordingly.

An appropriate order will be issued.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: June 1st, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation	:	Civil Action No.
Cases Consolidated II	:	1:CV-88-1452
	:	
This Document Relates to the	:	
following forty-two Plaintiffs:	:	
	:	
Dorothy L. Aldrich, Faith Alleman,	:	
Philip Angeli, Michael J. Anoka,	:	
Catherine J. Balinosky, Regis E. Beasley,	:	
Louis Borda, Betty M. Boylestein,	:	
George L. Boylestein, Shirlean	:	
Burhanan, Ruth Butler, Frank J. Caka,	:	
Susan H. Chynoweth, Daniel M.	:	
Chynoweth, Catherine Costello, John T.	:	
Costello, Martha A. Costik, Richard N.	:	
Costik, Mary Margaret Earhart, Edward	:	
T. Ferguson, Marco G. Glad, Jr., Linda	:	
I. Glad, Barbara Grandon, Helen M.	:	
Hank, Edward John Hertzog, Marie H.	:	
Hertzog, Dianne Hindermyer, George	:	
Vance Hitz, Marjorie B. Hitz, Carol C.	:	
Hoch, Louis A. Hoch, Estate of Robert	:	
P. Holmes, Thelma M. Nagy, Barry	:	
Obercash, Georgeann Pristello, James J.	:	
Pristello, Jaime Lynn Pristello, Kenneth	:	
R. Snyder, Patricia Southard, Joseph F.	:	
Stewart, Charlotte Evelyn Stewart	:	

ORDER

In accordance with the accompanying memorandum, **IT IS HEREBY ORDERED THAT:**

(1) Plaintiffs' request for oral argument is **DENIED.**

(2) Plaintiffs' motion for reconsideration is **GRANTED** in part and **DENIED** in part.

(a) The portion of this court's August 16, 1993 order which granted summary judgment in favor of Defendants and against the instant forty-two Plaintiffs is **VACATED.**

(b) On or before July 1, 1994, Plaintiffs shall file a notice with the court indicating which of the instant forty-two Plaintiffs have *Marinari* injuries and the nature of those injuries.

(c) Any further ruling on Defendants' July 9, 1992 motion for summary judgment is deferred pending the filing of Plaintiffs' notice.

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: June 1st, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation	:	Civil Action No.
Cases Consolidated II	:	1:CV-88-1452
	:	
This Document Relates to:	:	
	:	
Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart, Charlotte Evelyn Stewart	:	

ORDER

AND NOW, to wit, this 14th day of July, 1994, upon consideration of the terms of the Stipulation attached hereto as Exhibit "A" which has been executed by counsel for plaintiffs and counsel for defendants and which is hereby approved by the Court, it is hereby ORDERED that defendants' motion for summary judgment dismissing time-barred claims is GRANTED.

It is further ORDERED that there is no just reason for delay in entry of judgment dismissing the claims subject to that motion. This Court therefore directs that judgment be entered dismissing the claims of the following plaintiffs: Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart, Charlotte Evelyn Stewart.

BY THE COURT:

_____

SYLVIA H. RAMBO, C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re TMI Litigation	:	Civil Action No.
Cases Consolidated II	:	1:CV-88-1452
	:	
This Document Relates to:	:	
	:	
Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart, Charlotte Evelyn Stewart	:	

STIPULATION

It is stipulated and agreed, subject to the approval of the Court, that:

(1) Any claims by any of the 42 plaintiffs in the instant action for "second injuries" within the meaning of the *Marinari* decision shall be regarded as claims embraced by the class action ruling accorded plaintiffs in the *Hoover v. General Public Utilities* class action, C.A. No. 1:CV-92-1818.

(2) Counsel for plaintiffs and counsel for defendants agree that with respect to these 42 plaintiffs, *Marinari* shall be regarded as having retroactive application.

(3) Counsel for plaintiffs and counsel for defendants agree that *Marinari* does not relate to the "initial injury" claims which are the subject of the instant action and the instant motion for summary judgment. Accordingly, counsel agree that the Court may enter final judgment, pursuant to Rules 56 and 54(b), dismissing the presently asserted claims of the 42 plaintiffs based on the Pennsylvania statute of limitations. In entering into this agreement, plaintiffs do not waive, and defendants agree that plaintiffs do not waive, any claim or contention for appeal based on the Mississippi statute of limitations in effect as of the date each such plaintiff's Mississippi complaint was filed, or any claim or contention based on Pennsylvania authority related to "tolling" of the Pennsylvania statute of limitations.

Dated this 12th day of July, 1994.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

In Re: Three Mile Island	:	Civil Action No.
Cases Consolidated II	:	1:CV-88-1452
	:	
This Document Relates to:	:	
	:	
Dorothy L. Aldrich, Faith Alleman,	:	
Philip Angeli, Michael J. Anoka, Ruth V.	:	
Anoka, Catherine J. Balinosky, Regis E.	:	
Beasley, Louis Borda, Betty M.	:	
Boylestein, George L. Boylestein,	:	
Shirlean Burhanan, Ruth Butler, Frank	:	
J. Caka, Susan H. Chynoweth, Daniel	:	
M. Chynoweth, Catherine Costello, John	:	
T. Costello, Martha A. Costik, Richard	:	
N. Costik, Mary Margaret Earhart,	:	
Edward T. Ferguson, Marco G. Glad,	:	
Jr., Linda I. Glad, Barbara Grandon,	:	
Helen M. Hank, Edward John Hertzog,	:	
Marie H. Hertzog, Dianne Hindermyer,	:	
George Vance Hitz, Marjorie B. Hitz,	:	
Carol C. Hoch, Louis A. Hoch, Estate	:	
of Robert P. Holmes, Thelma M. Nagy,	:	
Barry Obercash, Georgeann Pristello,	:	
James J. Pristello, Jaime Lynn Pristello,	:	
Kenneth R. Snyder, Patricia Southard,	:	
Joseph F. Stewart, Charlotte Evelyn	:	
Stewart	:	

JUDGMENT IN A CIVIL CASE

In accordance with the order issued July 14, 1994, IT IS ORDERED AND ADJUDGED that summary judgment dismissing Plaintiffs' time-barred claims is entered against Plaintiffs Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Margaret Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Carol C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jaime Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart, Charlotte Evelyn Stewart and in favor of Defendants.

LANCE S. WILSON, Clerk of Court
(By Deputy Clerk)

Dated: July 22, 1994.

Filed July 18, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7598

In Re: TMI

Dorothy L. Aldrich; Faith Alleman; Philip Angeli; Michael J. Anoka; Ruth V. Anoka; Catherine J. Balinosky; Regis E. Beasley; Louis Borda; Betty Marie Boylestein; George L. Boylestein; Shirlean Burhanan; Ruth E. Butler; Frank J. Caka; Susan H. Chynoweth; Daniel M. Chynoweth; Catherine Costello; John T. Costello; Martha A. Costik; Richard N. Costik; Mary Margaret Earhart; Edward Ferguson; Marco G. Glad, Jr.; Linda I. Glad; Barbara Grandon; Helen M. Hank; Edward John Hertzog; Marie H. Hertzog; Dianne Hindermyer; George Vance Hitz; Marjorie B. Hitz; Carol C. Hoch; Louis A. Hoch; Estate of Robert P. Holmes; Thelma M. Nagy; Barry Obercash; Georgeann Pristello; James J. Pristello; Jamie Lynn Pristello; Kenneth R. Snyder; Patricia Southard; Joseph Stewart; Charlotte Evelyn Stewart,

Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 88-cv-01452)

Argued May 1, 1995
Before: SCIRICA, McKEE and SAROKIN, *Circuit Judges*

(Filed July 18, 1996)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

In the wake of the Three Mile Island nuclear accident in 1979, more than two thousand individuals brought suit for personal injuries. The forty-two plaintiffs in this appeal missed Pennsylvania's two year limitations date, and filed suit in Mississippi in order to fall within that state's six year statute of limitations. These plaintiffs now challenge the retroactive application of the choice of law provision of the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066. Retroactive application of the choice of law provision would require application of Pennsylvania's statute of limitations to all actions arising from the Three Mile Island accident and would bar plaintiffs' claims filed in Mississippi. Plaintiffs argue retroactive application of the choice of law provision violates federal constitutional guarantees of due process. Alternatively they argue that even if the Pennsylvania statute of limitations applies, Pennsylvania law provides for a grace period in which to file their claims. Because retroactive application of the choice of law provision was a rational exercise of Congress' legislative power, we hold it does not violate due process. Additionally, we hold Pennsylvania law does not provide for a grace period under the circumstances of this case.

The same plaintiffs also challenge summary judgment rendered against them in actions they filed in Pennsylvania state court after the two year limitation date. They assert the statute of limitations should have been tolled under Pennsylvania law. Because plaintiffs have failed to raise a material issue of fact, we will affirm summary judgment.

I. Facts and Procedural History

On March 28, 1979, the Three Mile Island nuclear power facility located near Harrisburg, Pennsylvania released radiation into the atmosphere. As a result, thousands of area residents and businesses filed suit against the owners and operators of the facility, alleging various injuries.[1] In 1985, each of the forty-two plaintiffs involved in this appeal filed suit

1. Over two thousand plaintiffs' claims for personal injuries have been consolidated in the present litigation. *See In re TMI*, 67 F.3d 1103, 1105 3d Cir. 1995), *cert. denied*

in Pennsylvania state court, Mississippi state court, and Mississippi federal court to recover for personal injuries allegedly suffered in the incident. The Mississippi actions were filed within that state's six year statute of limitations for personal injury actions.

In September 1986, defendants moved for summary judgment in plaintiffs' Pennsylvania state court actions contending each claim related to health problems diagnosed more than two years before plaintiffs commenced their suits. The Court of Common Pleas of Dauphin County, Pennsylvania entered summary judgment for defendants, finding plaintiffs' claims barred by Pennsylvania's two year statute of limitations. *In re TMI Litig. Cases Consolidated II*, No. 426 S (1985) (Dauphin Co. February 20, 1987); *In re TMI Litig. Cases Consolidated II*, No. 426 S (1985) (Dauphin Co. July 6, 1987). The Pennsylvania Superior Court affirmed. *In re TMI Litig. Cases Consolidated II*, No. 00426 Harrisburg 1987 (Pa. Super. July 15, 1988).

Subsequently, Congress enacted the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, which created a federal cause of action—the "public liability action"—for injuries resulting from nuclear incidents, 42 U.S.C. § 2014(hh) (1988),[2] and provided for jurisdiction over and the consolidation of such actions in the federal

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sub nom. General Public Util. Corp. v. Dodson, 116 S. Ct. 1034 (1996). Some plaintiffs filed duplicative claims in both Pennsylvania and Mississippi.

In 1981, defendants settled non-personal injury claims brought by individuals, businesses, and non-profit organizations within a twenty-five mile radius of the Three Mile Island facility. *See Stibitz v. General Pub. Util. Corp.*, 746 F.2d 993, 995 n.1 (3d Cir. 1984) (citing *In Re Three Mile Island Litig.*, No. 79-0432 (M.D. Pa. Sept. 9, 1981)), *cert. denied*, 469 U.S. 1214 (1985). In addition, hundreds of claims involving allegations of personal injury were settled in 1985.

We have already resolved other issues raised on appeal by the Plaintiffs. *See In re TMI*, 67 F.3d 1103 (duty of care); *In re TMI*, 67 F.3d 119 (3d Cir. 1995) (punitive damages), *cert. denied sub nom. Metropolitan Edison Co. v. Dodson*, 116 S. Ct. 1560 (1996).

2. The definition of "public liability action" appears at 42 U.S.C. § 2014(hh):

> (hh) The term 'public liability action', as used in [section 2210 of this title], means any suit asserting public liability. A public liability action shall be deemed to be an action arising under [section 2210 of this title], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C. § 2014(hh); *see also* Price-Anderson Amendments Act of 1988, Pub. L. 100-408, § 11(b), 102 Stat. 1066, 1076.

district court in the district where the accident occurred, 42 U.S.C. § 2210(n)(2).[3] Defendants removed the Pennsylvania and Mississippi state cases to federal court in the Middle District of Pennsylvania pursuant to 42 U.S.C. § 2210(n)(2). At the time of removal of the Pennsylvania state cases, the time to appeal the grant of summary judgment to the Pennsylvania Supreme Court had not yet expired. The Mississippi federal actions were transferred to the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a).

After consolidation of the cases in the Middle District of Pennsylvania, defendants filed a motion for summary judgment with respect to the Mississippi state and federal court actions on the grounds that plaintiffs' claims were untimely under the Price-Anderson Amendments Act of 1988. Section 11(b) of the Amendments Act, the choice of law provision (codified at 42 U.S.C. § 2014(hh) (1988)), provides that "the substantive rules of decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs." Section 20(b) of the Amendments Act, the effective date provision (codified as a note to 42 U.S.C. § 2014), provides that "the amendments made by Section 11" of the Amendments Act "shall apply to nuclear incidents

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3. The Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.), did not originally grant the federal courts jurisdiction over all claims arising out of nuclear accidents. The Price-Anderson Amendments Act expanded federal jurisdiction to reach all "public liability actions." After amendment by the Price-Anderson Amendments Act, the jurisdiction, removal, and consolidation provision of the Price-Anderson Act provided:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. . .

42 U.S.C. § 2210(n)(2) (1988); *see also* Price-Anderson Amendments Act of 1988, Pub. L. 100-408 § 11(a), 102 Stat. 1066, 1076.

In *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.*, 503 U.S. 906 (1992), we upheld the constitutionality of the retroactive application of this provision to cases arising from the Three Mile Island accident.

occurring *before*, on, or after the date of the enactment of this Act." 42 U.S.C. § 2014 note (emphasis added). The district court held that § 20(b), read in conjunction with § 11(b), compels retroactive application of Pennsylvania's two year statute of limitations to the causes of action brought by the plaintiffs, mandating the dismissal of the Mississippi state and federal cases as time barred. *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip. op. at 2-6 (M.D. Pa. Aug. 16, 1993). Plaintiffs do not dispute this reading of the Amendments Act on appeal.

Plaintiffs asserted before the district court that retroactive application of the choice of law provision would violate constitutional guarantees of due process. They also argued that Pennsylvania law, incorporated as federal law by the Amendments Act, would provide a grace period in which to file their claims. The district court rejected both arguments, *id.* at 15-20, and plaintiffs now appeal the district court's grant of summary judgment.

The district court also adopted the prior judgment rendered by the Court of Common Pleas against plaintiffs in the Pennsylvania state cases. *Id.* at 23. Plaintiffs sought reconsideration of the grant of summary judgment, arguing that under the intervening holding of the Pennsylvania Superior Court in *Marinari v. Asbestos Corp.*, 612 A.2d 1021 (Pa. Super. 1992), their claims arising from "second injuries" should not have been dismissed.[4] Upon reconsideration, the district court ordered plaintiffs to specify which plaintiffs had "second injuries" subject to the *Marinari* rule. *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip. op. at 13 (M.D. Pa. June 1, 1994). On July 12, 1994, the parties entered into a stipulation that *Marinari* did not relate to the "initial injury" claims which were the subject of defendants' motion for summary judgment and that any "second injury" claims would be treated in a separate class

4. When the Court of Common Pleas granted summary judgment, Pennsylvania was a "one-disease" state. This meant the statute of limitations for any claim arising out of exposure to a toxic substance began to run when the plaintiff knew or should have known of his "initial injury" resulting from exposure. *See Cathcart v. Keene Indus. Insulation*, 471 A.2d 493 (Pa. Super. 1984) (in banc). Subsequently, Pennsylvania became a "two disease" state. Under this rule, the statute of limitations on a claim for a separate and distinct "second injury" related to a prior toxic exposure would not begin to run until the second injury manifested itself. *See Marinari v. Asbestos Corp.*, 612 A.2d 1021 (Pa. Super. 1992).

action. *In re TMI Litig. Cases Consol. II*, No. 88-1452 (M.D. Pa. July 14, 1994). The district court then entered summary judgment against plaintiffs on the "initial injury" claims and dismissed them as time barred. *In re TMI Litig. Cases Consol. II*, No. 88 1452 (M.D. Pa. July 22, 1994). Plaintiffs appeal this order, arguing the statute of limitations had not expired on "initial injury" claims.

The district court had jurisdiction over these "public liability actions" under 42 U.S.C. § 2210(n)(2), and we exercise jurisdiction over the district court's final orders under 28 U.S.C. § 1291. Our review of the district court's grant of summary judgment is plenary. *See F.D.I.C. v. Bathgate*, 27 F.3d 850, 860 (3d Cir. 1994).

II. Statutory Construction

The district court held the language of § 20(b) is unambiguous and "by its very terms clearly requires the retroactive application of all of the provisions of § 11, including the choice of law provision." *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip. op. at 3 (M.D. Pa. Aug. 16, 1993). Although plaintiffs have not challenged the district court's reading of the Amendments Act on appeal, we exercise plenary review of the district court's construction of the Act. *Moody v. Sec. Pac. Business Credit, Inc.*, 971 F.2d 1056, 1063 (3d Cir. 1992).

Section 20(b) unambiguously calls for the retroactive application of the choice of law provision in § 11(b). The choice of law provision in turn provides that "the substantive rules for decision" shall be derived from Pennsylvania law. Since the statute of limitations is a substantive rule of decision, *Menichini v. Grant*, 995 F.2d 1224, 1228 n.2 (3d Cir. 1993); 42 Pa. Cons. Stat. Ann. § 5524 (1981), we believe the Pennsylvania statute of limitations applies retroactively to plaintiffs' causes of action filed in Mississippi.[5] Congress could have exempted statutes of limitations from

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5. Statutes of limitations are treated as substantive rules of decision for purposes of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). As the dissent points out, the intent of *Erie* was to ensure that "the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945).

We believe the *Erie* rationale is instructive in interpreting Congress' command that "the substantive rules for decision in [any public liability action] shall be derived from

retroactive application, but it did not. Accordingly, plaintiffs' Mississippi causes of action are time-barred, unless some constraint imposed by the Constitution or state law prevents this result.[6]

III. Due Process

The district court held the choice of law provision of the Price-Anderson Amendments Act requires application of Pennsylvania law, including the Pennsylvania statute of limitations, to the Mississippi state and federal cases. Plaintiffs argue the retroactive application of Pennsylvania's statute of limitations to bar properly filed and already pending causes of action violates federal constitutional due process. Well-established precedent indicates that it does not.

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the law of the State in which the nuclear incident occurs." 42 U.S.C. § 2014(hh); *see also* Price-Anderson Amendments Act of 1988, Pub. L. 100-408, § 11(b), 102 Stat. 1066, 1076. Although the legislative history is silent on the issue, we believe the clear language of this provision indicates an intent to ensure that the outcome of any public liability action arising from a single nuclear incident should be substantially the same as it would be if tried in the state where the incident occurred. The goal of achieving substantially the same outcome in all public liability actions, regardless of where filed, necessitates treatment of statutes of limitations as "substantive rules for decision." We do not believe Pennsylvania law can answer whether Congress intended the term "substantive rules for decision" to include statutes of limitations.

Of course, because Pennsylvania courts do not sit in diversity, they will never have the occasion to decide whether to apply the Pennsylvania or the Mississippi statute of limitations to an action filed in Mississippi. But Pennsylvania courts generally "apply[ ] Pennsylvania's statute of limitations not only to wholly domestic causes of action but also to causes of action arising in other jurisdictions (unless, pursuant to Pennsylvania's borrowing statute, a Pennsylvania court is directed to apply a *shorter* limitation statute of another jurisdiction.)" *AAMCO Transmissions, Inc. v. Harris*, 759 F. Supp. 1141, 1143-44 (E.D. Pa. 1991) (footnotes omitted).

6. Section 20(b) provides that "the amendments made by Section 11" "shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act." The dissent contends that the words "shall apply" may be interpreted in two ways: as requiring the application of Pennsylvania law from the date of filing of pending suits, or from August 20, 1988 forward. The dissent asserts the former interpretation necessitates imposition of a "historical fiction," while the latter merely "attaches new legal consequences to events completed before [ ] enactment [of the Amendments Act]." Dissent at 22.

But we do not create a historical fiction that plaintiffs filed suit on any date other than that on which they actually filed. We simply attach new legal consequences to the

A.

Under the United States Constitution, legislation affecting a pending tort claim is not subject to "heightened scrutiny" due process review because a pending tort claim does not constitute a vested right. *See Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (plaintiff does not have a vested right in a tort cause of action until there is a final, unreviewable judgement); *see also Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (retroactivity of a statute does not make it unconstitutional as a legal claim affords no enforceable property right until reduced to final judgement); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (same). Other courts of appeals that have recently addressed the constitutionality of retroactive legislation that either abolishes or substantially affects a plaintiff's pending tort cause of action have reviewed such legislation on a "rational basis" standard. *See, e.g., In*

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fact that the filing date was not within two years of the Three Mile Island accident. In sum, we apply Pennsylvania's statute of limitations retroactively, as the clear language of § 20(b) and § 11(b) demands. The dissent, on the other hand, attaches no legal consequences to the application of Pennsylvania's statute of limitations. In fact, the dissent does not apply the Pennsylvania statute of limitations retroactively at all, but only prospectively to suits brought after the enactment of the Amendments Act. It refuses to apply the statute of limitations retroactively, despite the clear language that Pennsylvania law "shall apply," and even though it acknowledges that rulings made prior to the passage of the Amendments Act on the basis of substantive law which no longer applies should be modified to conform to the new governing law of the case. Dissent at 23.

We believe the unambiguous language of § 20(b) and § 11(b) calls for the retroactive application of all of Pennsylvania law, including the statute of limitations. It is difficult to conceive of a clearer formulation than the "shall apply" language in § 20(b). In fact, in *Landsgraf v. USI Film Products*, 114 S. Ct. 1483, 1494 (1994), the Supreme Court considered virtually identical language to have "a determinate meaning" mandating retroactive application of legislation. *See id.* (language such as "the new provision 'shall apply to all proceedings pending on or commenced after the date of enactment'" mandates retroactive application). The dissent invokes the often stated presumption against retroactive legislation. Dissent at 22-23. But if Congress has "expressly prescribed" a statute should apply retroactively, "there is no need to resort to judicial default rules." *Landsgraf* at 1505. The dissent also asserts that its interpretation accords with Congressional intent. Yet it has not offered any evidence that Congress intended to except statutes of limitations from retroactive application.

Finally, we note that plaintiffs have not argued that § 20(b) is ambiguous or that it exempts statutes of limitations from retroactive application.

re consolidated U.S. Atmospheric Testing Litig., 820 F.2d 982, 990-91 (9th Cir. 1987) (plaintiff challenging retroactivity bears the burden of showing that the legislature acted in arbitrary, irrational way), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *see also Hammond*, 786 F.2d at 13. In *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.*, 503 U.S. 906 (1992), we held that due process requires only that "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." *Id.* at 860 (quoting *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984)). Accordingly, in order to show that retroactive application of the choice of law provision of the Amendments Act violates due process guarantees, plaintiffs bear the burden of showing that retroactive application was "irrational in purpose and effect." *Id.* at 861. This they cannot do.

B.

Congress adopted the Amendments Act "to effect uniformity, equity, and efficiency in the disposition of public liability claims" arising from nuclear accidents. H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 3, at 18 (1987). We believe retroactive application of the Amendments Act's choice of law provision furthers each of these goals.

First, retroactive application of the Amendments Act's choice of law provision uniformly applies Pennsylvania law to all plaintiffs. Second, retroactive application advances equity by applying the same law to all similarly situated plaintiffs and eliminating inconsistent results. While retroactive application of the choice of law provision requires dismissal of these plaintiffs' claims which were filed in compliance with Mississippi's six year statute of limitations, this result is not inequitable. These actions were time-barred in Pennsylvania when they were brought, and plaintiffs resorted to a distant forum in order to avoid Pennsylvania's statute of limitations. Application of the law of the state in which the accident occurred, the plaintiffs live, and where the plaintiffs were allegedly injured is not inequitable.

Finally, retroactive application of the choice of law provision promotes efficiency by allowing the constitutional exercise of federal juris-

diction over, and the consolidation of, these "public liability actions." Prior to the Amendments Act, the Price-Anderson Act provided for federal jurisdiction over only a limited class of cases—those arising from an "extraordinary nuclear occurrence." *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986); *Stibitz v. Gen. Pub. Utils. Corp.*, 746 F.2d 993, 997 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985). Because the Nuclear Regulatory Commission did not designate the Three Mile Island accident an "extraordinary nuclear occurrence," the federal courts lacked subject matter jurisdiction to hear Three Mile Island cases filed in jurisdictions across the country. This situation resulted in "duplicative determinations of similar issues in multiple jurisdictions." S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488.

Congress sought to remedy the procedural problems plaguing the Three Mile Island cases by retroactively providing for federal jurisdiction over them and allowing their consolidation. But in creating federal jurisdiction, Congress was constrained by the constitutional principle that it cannot confer subject matter jurisdiction on federal courts where there is no underlying federal statute creating a federal question. *See Osborne v. Bank of United States*, 22 U.S. (9 Wheat) 738 (1824); *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *see also In re TMI Litig. Cases Consol. II*, 940 F.2d at 849 ("a case cannot be said to arise under a federal statute where there is nothing more than a jurisdictional grant."). Congress was clearly aware of this constitutional constraint.[7] It did not, therefore, simply grant federal courts subject matter jurisdiction over all cases arising from nuclear accidents. Instead it created substantive federal law governing nuclear accidents in the choice

7. In its report, the Senate Committee on Environment and Public Works stated the choice of law provision was essential to creating federal jurisdiction over public liability actions:

> [In order to] avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation . . . the bill provides the federal district court in which the nuclear incident occurred with subject matter jurisdiction over claims arising from the nuclear incident. [The choice of law provision provides that] [a]any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, and the substantive law of decision shall be derived from the law of the state in which the incident occurred, *in order to satisfy the*

of law provision of the Amendments Act by providing "the substantive rules of decision in [any public liability action] shall be derived from the law of the State in which the nuclear incident involved occurs." 42 U.S.C. § 2014(hh). In the absence of the retroactive application of the choice of law provision to the Three Mile Island cases, Congress' retroactive creation of federal jurisdiction over them in the Amendments Act would be nothing more than an unconstitutional grant of jurisdiction without any underlying substantive federal legislation creating a federal question. *In re TMI Litig. Cases Consol. II*, 940 F.2d at 854-55; *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1096-1101 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994).[8] Accordingly, there is little doubt that the retroactive application of the choice of law provision has furthered the efficient and uniform processing of claims arising from the Three Mile Island accident by allowing those claims to be brought and to be consolidated in federal court.

Because retroactive application of the choice of law provision to pending causes of action advances Congress' goals of uniformity, equity

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Article III requirement that federal courts have jurisdiction over cases arising under the Constitution or the laws of the United States.

S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488 (emphasis added).

The House Committee on Interior and Insular Affairs came to the same conclusion. Reporting on H.R. 1414, the House version of the Amendments Act, it explained:

> The Committee recognizes, of course, that Article III of the Constitution limits the type of cases that federal courts created under the Article may hear. For this reason, H.R. 1414 expressly states that any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, thereby making suits asserting public liability "Cases . . . arising under . . . the laws of the United States" within the meaning of Article III. Rather than designing a new body of substantive law to govern such cases, however, the bill provides [in the choice of law provision] that the substantive rules for decision in such actions shall be derived from the law of the state in which the nuclear incident involved occurs, unless such law is inconsistent with the Price-Anderson Act. The Committee believes that conferring on the Federal courts jurisdiction over claims arising out of all nuclear incidents in this manner is within the constitutional authority of Congress and notes that Congress has used this approach in the Outer Continental Shelf Lands Act.

H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18 (1987).

8. Congress explicitly stated that the jurisdiction and consolidation provision of the Amendments Act should apply retroactively to pending causes of action. *See* 42 U.S.C. § 2210(n)(2) (Amendment Act's consolidation and removal provision shall apply to all

and efficiency in the disposition of claims arising from nuclear accidents, it is not arbitrary and irrational. Plaintiffs have not demonstrated retroactive application violates constitutional due process. *Cf. O'Conner v. Commonwealth Edison Co.*, 13 F.3d at 1102 (retroactive application of Amendments Act not arbitrary and irrational); *In re TMI Litig. Cases Consol. II*, 940 F.2d at 860-61 (same).

IV. Grace Period under Pennsylvania Law

Plaintiffs also argue retroactive application of the Amendments Act's choice of law provision does not require dismissal of the Mississippi actions. They assert the choice of law provision incorporates all Pennsylvania law as federal law, including a century-old line of Pennsylvania cases that holds due process requires a grace period when the legislature retroactively curtails a statute of limitations. *See Kay v. Pennsylvania Railroad Co.*, 65 Pa. 269 (1870); *Byers v. Pennsylvania Railroad Co.*, 18 Pa. Co. Ct. R. 187 (Allegheny Co. 1896); *Philadelphia B. & W.R. Co. v. Quaker City Flour Mills Co.*, 127 A. 845 (Pa. 1925); *Ferki v. Frantz's Transfer Co.*, 31 A.2d 586 (Pa. Super. 1943); *Wilson v. Central Penn Indus., Inc.*, 452 A. 2d 257 (Pa. Super. 1982). The district court declined to follow this line of cases, doubting its vitality in light of intervening developments in property law relating to vested rights, and refusing to read broad due process rights into the Pennsylvania Constitution on such a weak precedential basis.[9] *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip. op. at 17-19 (M.D. Pa. Aug. 16, 1993). Even if the grace period doctrine retains force under the Pennsylvania Constitution, we

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public liability actions, "including any such action pending on August 20, 1988"). Congress understood that the jurisdiction and consolidation provision could not pass constitutional muster without the choice of law provision. Accordingly, we believe Congress intended the choice of law provision also to apply retroactively.

Moreover, even if retroactive application of the choice of law provision is not constitutionally essential, Congress at least had to create a federal cause of action for cases arising out of nuclear incidents before the district court could exercise jurisdiction. It did this in § 11(b) of the Amendments Act—the section in which the choice of law provision is contained—by defining a "public liability action." If § 11(b) does not apply retroactively, we do not have jurisdiction over the plaintiffs' claims because there was no federal cause of action under the Price-Anderson Act prior to its passage. *Stibitz v. General Pub. Utils. Corp.*, 746 F.2d at 996.

9. Most of the cited cases base their imposition of a grace period on the due process clause of the Fourteenth Amendment of the United States Constitution or on cases

do not believe the Pennsylvania Supreme Court would apply it under the facts of this case.

None of the Pennsylvania grace period cases addresses a situation in which Pennsylvania plaintiffs failed to sue within the time period allotted by the Pennsylvania statute of limitations and brought suit in another state's courts to avoid Pennsylvania's time bar. We believe the Pennsylvania borrowing statute, 42 Pa. Cons. Stat. Ann. § 5521 (1981), accurately reflects current state policy against "forum shopping" by applying to claims arising in another state either the other state's statute of limitations or the Pennsylvania statute of limitations, whichever is shorter. "Pennsylvania's borrowing statute unequivocally [evinces] the legislative intent to prevent a plaintiff who sues in Pennsylvania from obtaining greater rights than those available in the state where the cause of action arose." *Gwaltney v. Stone*, 564 A.2d 498, 503 (Pa. Super. 1989). We believe Pennsylvania courts would not look favorably on plaintiffs here who missed Pennsylvania's statute of limitations, although Pennsylvania is the state where the accident occurred, and brought suit in Mississippi. Even if the Pennsylvania Supreme Court would require a grace period when the Pennsylvania legislature retroactively shortens a statute of limitations, we do not believe they would require a grace period in this case.

V. The Discovery Rule and Fraudulent Concealment

Plaintiffs in the Pennsylvania state cases appeal the district court's grant of summary judgment on their "initial injury" claims.[10] First, plain-

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construing the Fourteenth Amendment. *See, e.g., Quaker City Flour*, 127 A. at 846-47; *Ferki*, 31 A.2d at 587-88; *Wilson*, 452 A.2d at 260. These cases treat an accrued tort cause of action as a "vested right" under the United States Constitution, *see Jenkins v. Hospital of Med. College*, 634 A.2d 1099, 1104-05 (Pa. 1993), and are contrary to current federal constitutional precedent that finds no vested right in a tort cause of action before final judgment, *see, e.g., Arbour*, 903 F.2d at 420; *Hammond*, 786 F.2d at 12. They also conflict with current case law that finds no Fourteenth or Fifth Amendment due process violation in rational, retroactive legislation not affecting vested rights. *See, e.g., In re TMI Litig. Cases Consol. II*, 940 F.2d at 860-61; *Sowell*, 888 F.2d at 805; *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d at 990-91.

10. The district court originally adopted in its entirety the prior judgment rendered by the Dauphin County Court of Common Pleas against plaintiffs in the Pennsylvania state cases. *In re TMI Litig. Cases Consol. II*, No 88-1452, slip. op. at 23 (M.D. Pa. Aug.

tiffs argue the statute of limitations was tolled under the "discovery rule" until they knew or should have known their injuries were caused by the Three Mile Island accident. Plaintiffs assert there are material issues of fact as to whether they knew or should have known the cause of their injuries. Second, plaintiffs argue the statute of limitations was tolled because defendants fraudulently concealed information about the Three Mile Island accident.

A. The Discovery Rule

The discovery rule tolls the running of a statute of limitations until "the plaintiff knows, or reasonably should know: (1) that he has been injured, and (2) that his injury has been caused by another party's conduct." *Cathcart v. Keene Industrial Insulation*, 471 A.2d 493, 500 (Pa. Super. 1984) (in banc); *see also Hayward v. Medical Ctr. of Beaver County*, 608 A.2d 1040, 1043 (Pa. 1992). Every plaintiff has a duty to exercise "reasonable diligence" in ascertaining the existence of an injury and its cause. *Stauffer v. Ebersole*, 560 A.2d 816, 817 (Pa. Super.), *app. denied*, 571 A.2d 384 (1989).

In their brief, plaintiffs assert that several plaintiffs filed their actions within two years of diagnosis of a specific injury, and thereby complied with the discovery rule. Under Pennsylvania law, plaintiffs bear the burden of proving they filed their claims within the applicable statute of limitations. *See Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876, 884 (3d Cir.) (citing cases), *cert. denied*, 112 S. Ct. 581 (1991). Where, as here, the non-moving party bears the burden of proof at trial, summary judgment is appropriate if non-movants fail to "make a showing sufficient to establish the existence of an element essential to [their] case." *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). In responding to a motion for summary judgment, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial." *Celo-*

16, 1993). Upon reconsideration, the court limited the state court's holding to "initial injury" claims. It then entered summary judgment against plaintiffs on the "initial injury" claims and dismissed them as time barred. *In re TMI Litig. Cases Consol. II*, No. 88-1452 (M.D. Pa. July 22, 1994).

tex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (internal quotations omitted). Beyond mere assertions, plaintiffs have not directed us to any evidence in the record that raises a material issue of fact as to whether any plaintiff filed suit within two years of discovery of an "initial injury." Accordingly, we believe summary judgment was appropriate.

Plaintiffs also argue that "because the [discovery rule] involves questions of what a reasonable person should have known, a classic jury question is invariably presented, thereby precluding the use of the summary judgment procedure." Brief of the Appellants at 35-36. But the Court of Common Pleas held, and the record confirms, that the plaintiffs knew of the Three Mile Island accident,[11] and knew or should have known that exposure to radiation could cause adverse health affects. In such circumstances, the discovery rule does not toll the running of the statute of limitations.

Plaintiffs also assert summary judgment was improper because factual questions remain as to whether they used reasonable diligence to discover the cause of their injuries. The Court of Common Pleas held:

> The responses to interrogatories . . . reveal plaintiffs knew of their specific injury more than two years prior to the time they filed their complaint. Thus, at that time they possessed the requisite knowledge to set the statutory clock running. Under the law of Pennsylvania they were under a duty to use all reasonable diligence to investigate the operative facts of their cause of action. . . . Given the notoriety of the accident and the plethora of investigative reports available to plaintiffs, it is clear that they had the "means of discovery" available to them.

In re TMI Litig. Cases Consolidated II, No. 426 S (1985), slip op. at 8-9 (Dauphin Co. February 20, 1987). Plaintiffs have not directed us to any evidence in the record that leads us to doubt these conclusions. Accordingly, we believe the district court properly granted summary judgment with respect to "initial injury" claims.

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11. Although plaintiffs did not file suit until almost six years after the Three Mile Island accident, they were able to answer in detail defendants' interrogatories on how they came to know of the accident, and where they were during the course of the accident. Some plaintiffs even left the geographic area in response to the accident.

B. Fraudulent Concealment

Plaintiffs also argue the statute of limitations was tolled because defendants fraudulently concealed information relating to the Three Mile Island accident. *See Molineux v. Reed*, 532 A.2d 792, 794 (Pa. 1987) ("Where through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations.") (internal quotations omitted). In order to establish fraudulent concealment by a defendant, a plaintiff must prove "an affirmative or independent act of concealment that would divert or mislead the plaintiff from discovering the injury" or its cause. *Bohus v. Beloff*, 950 F.2d 919, 925 (3d Cir. 1991). But plaintiffs have not directed us to any evidence that defendants sought to conceal the cause of their injuries. While plaintiffs have referred to statements by defendants' employees downplaying the seriousness of the accident immediately after it occurred, such statements do not create an issue of material fact with respect to fraudulent concealment.

In response to plaintiffs' fraudulent concealment argument, the Court of Common Pleas found:

> The contention simply cannot prevail. Here, defendants did not "conceal" the fact that radiation escaped from the TMI facility. Defendants did nothing to induce plaintiffs not to file timely claims. In fact, the notice of the 1981 class action settlement, which was disseminated to all households within twenty-five miles of the reactor and widely publicized, put all persons on notice that if they believed they had a claim for personal injury, they should start their own lawsuit. This is not the type of conduct which could give rise to a claim of estoppel.
>
> Moreover, given the vast amount of information available to plaintiffs concerning the nature and extent of the accident, it is not rationally possible to ascertain any basis from which plaintiffs could claim that defendants are estopped from asserting the limitations defense. Defendants engaged in no affirmative action which could have caused these plaintiffs to deviate from their right of inquiry.

In re TMI Litig. Cases Consolidated II, No. 426 S (1985), slip op. at 10 (Dauphin Co. February 20, 1987).

We agree that defendants' statements could not have caused plaintiffs to deviate from their right of inquiry into the source of their injuries. The record reflects that voluminous information about the Three Mill Island accident was in the public domain.[12] Moreover, many other plaintiffs obtained sufficient information to file suit within the statute of limitations. Under these circumstances, plaintiffs have not raised a genuine issue of material fact with respect to fraudulent concealment. Summary judgment was proper.

VI. Conclusion

The choice of law provision of the Price Anderson Amendments Act, 42 U.S.C. § 2014(hh), mandates the retroactive application of Pennsylvania's two year statute of limitations to the plaintiffs claims filed in Mississippi state and federal court. Retroactive application comports with constitutional requirements of due process, and, in the circumstances of this case, Pennsylvania law does not provide for a grace period in which plaintiffs may file their claims. No issue of material fact precluded a grant of summary judgment based on the statute of limitations in the Pennsylvania state cases. For the foregoing reasons, we will affirm the judgment of the district court.

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12. The Three Mile Island accident was the subject of extensive investigation and exhaustive reports long before plaintiffs were diagnosed with their illnesses or brought suit. *See Pennsylvania v. General Pub. Util. Corp.*, 710 F.2d 117, 118 n.1 (3d Cir. 1983).

SAROKIN, *Circuit Judge*, dissenting.

I dissent primarily because I cannot conclude that Congress intended the Amendments Act to extinguish pending suits that were timely instituted in accordance with then-applicable statutes of limitations simply because they would not have satisfied the statute of limitations of the forum in which the underlying nuclear accident occurred. Nor can I conclude that Congress intended that certain pending claims survive while other identical ones cease to exist as a result of limitations periods that did not apply on the day those claims were filed. Certainly such a result is inconsistent with Congress's intent to promote " 'equitable and uniform treatment of victims.' " *TMI II*, 940 F.2d at 861 (quoting H.R.Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18, 29 (1987)).

I agree with the majority that the jurisdictional provision, the choice-of-law provision, and the definition of "public liability action" contained in section 11 apply retroactively to lawsuits that were pending when the Amendments Act was passed. Because the majority's understanding of that retroactive application sweeps too broadly, however, I respectfully dissent.

It is well established that "[a] law is retrospective if it 'changes the legal consequences of acts completed before its effective date.' " *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). Thus, retroactive legislation includes " 'all statutes, which, *though operating only from their passage*, affect vested rights and past transactions.' " *Id.* (quoting *Society for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (No. 13,156) (CCDNH 1814)) (emphasis added). In the words of Justice Story,

> "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ."

Id. (citation omitted). Nevertheless, "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 1498 (1994). Ultimately, whether a particular application is retroactive "depends upon

what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 857 n.3 (1990) (Scalia, J., concurring).

In this case, Congress expressly stated that the Amendments Act "shall apply to nuclear incidents occurring *before*, on, or after the date of the enactment of this Act." 42 U.S.C. § 2014 (emphasis added). I agree with the majority that the term "nuclear incidents" includes pending actions arising from such incidents. What is unclear from the statute is how exactly the "shall apply" language should be interpreted in the context of pending actions.

The statute itself offers no guidance on this point. As a theoretical matter, however, retroactivity can be understood in one of two ways. First, it can be understood as the majority apparently construes it: as a rewriting of history. Under this theory, section 20 reaches into the past to transform pending lawsuits as of their inception, undoing and rewriting all subsequent proceedings and applying new law as though it had existed from the date of filing. This theory engenders a historical fiction pursuant to which plaintiffs' suits were public liability actions when they were filed in 1985, governed by Pennsylvania substantive law and subject to original federal jurisdiction, although the Amendments Act did not take effect until three years later.

Alternatively, the Amendments Act can be seen as retroactive in the more limited sense that it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 114 S. Ct. at 1499. This theory would mean simply that all pending actions asserting public liability were transformed on August 20, 1988 into public liability actions, and that the federal courts acquired original jurisdiction over those actions as of, but not prior to, that date.

Either interpretation of retroactivity is acceptable as a theoretical matter. It is our task to determine which is the correct one under the circumstances of this case.

I conclude that the latter interpretation of retroactivity under section 20 is the correct one, for several reasons. First and foremost, applying the Amendments Act to pending cases from August 20, 1988 forward accomplishes the goals that Congress intended the retroactivity provision to accomplish by defining the pending Three Mile Island cases

as public liability actions and providing for their removal to federal court and litigation under federal substantive law.

Second, where, as here, the statute is ambiguous as to the appropriate scope of retroactivity, I believe that the well-established presumption against statutory retroactivity requires interpreting that scope narrowly. In this case, the statute neither states explicitly that the substantive law of the state in which the incident occurred applies "retroactively" to pending actions nor offers any guidance as to how the language "shall apply" should be interpreted in the context of a pending action. It is ambiguous as to whether section 11 applies to pending actions as of August 20, 1988, or whether, as the majority concludes, it applies to such actions as of their inception. In the absence of explicit Congressional instruction, I believe that the principles underlying the anti-retroactivity presumption make the former interpretation far more appropriate than the sweeping approach to retroactivity enunciated by the majority.[1]

Third, this interpretation eliminates the strained historical fiction on which the majority opinion, by necessity, must be based, thereby providing a more rational analytic framework for effectuating Congress's intent and leading to a more equitable result. For the most part, the practical effect of the retroactivity provision is the same under either interpretation; in either case, rulings made prior to the passage of the Amendments Act on the basis of substantive law which no longer applies can be modified to conform to the new governing law of the case. Causes of action recognized in the filing state but not in the forum state can be dismissed. Rules of evidence, burdens of proof, and jury instructions all can be adjusted to accommodate the law of the forum. Under the majority's interpretation, these adjustments would be made by adopting a fiction that Pennsylvania law applied from the beginning and then

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1. This is not to suggest that the presumption against retroactive legislation governs this case; on the contrary, I am in agreement with the majority that Congress intended the Amendments Act to apply retroactively. *See* Majority Op. at 9-10 n.6. The principles underlying the anti-retroactivity presumption are relevant, however, insofar as they evince a cautious and conservative approach to retroactivity that is fundamental to our legal system. Where, as here, there is a question as to the intended scope of retroactivity, I believe that the principles underlying the anti-retroactivity presumption urge us to interpret that scope narrowly.

relitigating the entire case accordingly. Under my interpretation, these adjustments can be made simply by applying Pennsylvania law after August 20, 1988 to motions, new or renewed, brought by the parties. In other words, after August 20, 1988, a party can move to dismiss a claim that no longer has any legal basis, renew a summary judgment motion that failed previously but might now succeed, or seek reconsideration of prior evidentiary rulings that do not stand up under the new governing law. Thus, while the two interpretations require different procedures for implementation, the ultimate effect on the parties is, for the most part, the same in both cases.

In the statute of limitations context, however, the difference in theory between the two interpretations translates into a crucial difference in outcome. The historical fiction on which the majority's theory is premised forces the majority to conclude that plaintiffs' action, although filed within the Mississippi statute of limitations, is now barred by the Pennsylvania statute of limitations—an inequity which I believe contravenes Congress's intent and which my theory avoids. Statutes of limitations are uniquely concerned with a specific point in time: the date on which the complaint was filed. While a defendant can raise the statute of limitations as a defense at any time during the course of a lawsuit, the relevant question for the court is always whether, *at the time the case was filed,* the applicable statute of limitations was satisfied. Because the majority reasons that section 20 requires extending Pennsylvania law back in time to the inception of plaintiffs' action, it concludes that Pennsylvania's statute of limitations applied—and was violated—at the time the suit was filed. However, *at the time it was filed,* plaintiffs' lawsuit was not a public liability action. As a result, I conclude that it was governed *at the time it was filed* by Mississippi, not Pennsylvania, law. Although the substantive law of Pennsylvania governs plaintiffs' case from August 20, 1988 forward, the statute of limitations was satisfied or violated back in 1985, when Mississippi law applied. At that time, under the applicable law, I conclude that it was satisfied.

Finally, the interpretation I endorse conforms with the "settled policy" of federal courts to "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States,* 490

U.S. 858, 864 (1989), by eliminating the constitutional questions of due process raised by the majority's interpretation. If the Amendments Act applies to pending actions from August 20, 1988 forward, then there is no issue as to whether the Act violates the due process rights of plaintiffs to pending lawsuits, because the Pennsylvania statute of limitations does not apply to deprive plaintiffs of their cause of action.

As a result, I conclude that the retroactivity provision of the Amendments Act does not rewrite history as applied to pending actions, but rather operates by changing the ground rules midway through the game, altering the legal status and governing law of pending actions from the time of its enactment forward.

The majority proffers that it agrees with this interpretation, and denies that its interpretation of section 20 engenders a rewriting of history.[2] Nevertheless, while conceding that the definition of public liability action, the choice-of-law provision, and the original jurisdiction provision apply to pending cases from August 20, 1988 forward, the majority concludes that plaintiffs' lawsuit was filed in violation of Pennsylvania's two-year statute of limitations. Both positions cannot be correct. In effect, the Amendments Act drew a bright line down the middle of this lawsuit on August 20, 1988, dividing the case into two distinct parts. Prior to August 20, 1986, the suit was generic and Mississippi law governed; since that date, it has been a public liability action and Penn-

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2. The majority's understanding of the term "historical fiction" is different from what I intend. In denying that its interpretation of the Amendments Act engenders a historical fiction, the majority states that it "do[es] not create a historical fiction that plaintiffs filed suit on any day other than that on which they actually filed." This rebuttal is wide of the mark. My point is simply this: (1) When plaintiffs filed their suit, it was not a public liability action—indeed, that cause of action did not yet exist; (2) When plaintiffs filed their suit, it was not governed by Pennsylvania law; (3) When plaintiffs filed their suit, it satisfied the applicable statute of limitations; (4) On August 20, 1988, plaintiffs' suit was transformed into a public liability action, governed by Pennsylvania substantive law and subject to federal jurisdiction; (5) In order to conclude that plaintiffs' suit was filed in violation of the Pennsylvania statute of limitations, the majority must first conclude that the Pennsylvania statute of limitations applied to plaintiffs' suit at the relevant time: the day on which it was filed. Because Pennsylvania law applies only to public liability actions, however, the majority's holding in this case cannot be sustained without the historical fiction that plaintiffs' suit was a public liability action on the day it was filed.

sylvania law governs. I think it logically inconsistent to hold, as the majority does, that plaintiffs' suit was not a public liability action when it was filed, and yet conclude that it was required at the time it was filed to satisfy the Pennsylvania statute of limitations—a statute that only applies to this action in its public incarnation.[3] Either plaintiffs' lawsuit was a public liability action when it was filed, subject to federal jurisdiction and Pennsylvania's statute of limitations, or it was not.

Therefore, in my view it is the majority, and not I, who seeks to treat the statute of limitations differently from all other "substantive rules for decision" of Pennsylvania law. While concluding that Pennsylvania substantive law operates on plaintiffs' lawsuit from August 20, 1988 forward, the majority carves out an exception for the statute of limitations, allowing it to reach back in time—crossing the imaginary line drawn by the Amendments Act—to operate on the suit on the day it was filed. This treatment of the statute of limitations clashes directly with the majority's overarching theory of the case. Statutes of limitations, as discussed above, can only be violated (or satisfied) at one specific point in time—the day on which the suit was filed—notwithstanding that such violations can be called to the attention of the court at any point during the pendency of a lawsuit. Under the majority's own interpretation of section 20, this case was not a public liability action when it was filed, and Pennsylvania law did not apply. As a result, the majority's treatment of the statute of limitations cannot be reconciled with its interpretation of the meaning and effect of the Amendments Act.

The majority seeks to justify this illogical result in terms of congressional intent. It is not at all clear, however, that Congress intended the choice-of-law provision of the Amendments Act to encompass statutes of limitations. While it is well established that statutes of limitations are characterized as substantive law for purposes of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *see Guaranty Trust Co. of*

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3. As explained *infra*, I question whether Congress intended the phrase "substantive rules of decision" to include statutes of limitations in the first place. Because I think that the majority's argument fails even if the Amendments Act encompasses statutes of limitations, however, I will assume for now that the Pennsylvania statute of limitations is substantive law in this context.

New York v. York, 326 U.S. 99, 109 (1945), this does not mean that they are considered substantive in other contexts. Indeed, in holding that statutes of limitations are substantive for purposes of the *Erie* doctrine, such that federal courts sitting in diversity must apply state statutes of limitations, the Supreme Court confined its analysis narrowly to the context of *Erie:*

> It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions *in any use of those terms unrelated to the specific issue before us. Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to ensure that, *in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties*, the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Guaranty Trust Co. of New York, 326 U.S. at 109 (emphasis added).

In this case, the majority opinion's conclusion that "the statute of limitations is a substantive rule of decision," Majority Opinion, at 8, is based entirely on cases holding that statutes of limitations are substantive rather than procedural for purposes of *Erie*. The characterization of statutes of limitations as substantive for *Erie* purposes, however, was not based on an assessment of their procedural or substantive nature in the abstract but rather on their impact on the federalism concerns that *Erie's* rough procedural/substantive distinction was intended to address. *See Guaranty Trust Co.*, 326 U.S. at 109.

In this case, by contrast, there is no federalism concern at issue and no balance of power between federal and state courts to be maintained. The cause of action is federal, and the only question is whether Congress intended the term "substantive rules for decision" to include statutes of limitation. The legislative history of the Amendments Act is silent on this point; indeed, there is nothing to indicate that Congress even considered

the status of statutes of limitations under that Act, much less intended to include them as substantive rules of decision. Moreover, a review of Pennsylvania case law makes clear that the courts of Pennsylvania "generally treat statutes of limitations as 'procedural.' " *AAMCO Transmissions, Inc. v. Harris*, 759 F. Supp. 1141, 1143-44 (E.D. Pa. 1991) (footnotes omitted); *Boyle v. State Farm Mutual Automobile Ins. Co.*, 465 A.2d 156, 162 (1983); *Altoona Area Sch. Dist. v. Campbell*, 618 A.2d 1129, 1134 (1992). This strikes me as a strong indication that the courts of Pennsylvania would not consider the phrase "substantive rules for decision" to include Pennsylvania's statutes of limitations.[4] For these reasons, I do not think that congressional intent with respect to statutes of limitations is clear enough to sustain the majority's logically inconsistent conclusion that plaintiffs' suit is time-barred.[5] *See* Majority Op., at 8-9 ("Congress could have exempted statutes of limitations from retroactive application, but it did not.").

Nor is there any evidence in the legislative history or elsewhere that Congress intended the sweeping retroactivity that the majority endorses.

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4. The majority cites *AAMCO Transmissions, Inc. v. Harris*, 759 F. Supp. 1141, 1143-44 (E.D. Pa. 1991), for the proposition that Pennsylvania courts generally apply Pennsylvania's statute of limitations to causes of action that arose in other jurisdictions as well as to causes of action that arose in Pennsylvania. Majority Op., at 8-9 n.5. This may well be true, but it is irrelevant to the issue at hand, for two reasons. First, Pennsylvania law regarding the statute of limitations has no bearing on the question before us: whether section 20—a federal statute—requires us to apply Pennsylvania's statute of limitations retroactively to bar the underlying actions. This is purely a question of federal law, and neither the courts nor the statutes of Pennsylvania can provide the answer. Second, even if Pennsylvania law were relevant to the issue at hand, the language quoted by the majority is inapposite. The quoted language describes the way in which Pennsylvania courts treat cases which are filed in Pennsylvania in the first instance but which are based on events that took place ("arose") outside the jurisdiction—not cases such as this one which were filed in other jurisdictions and later transferred to Pennsylvania. It tells us nothing about the way Pennsylvania courts would treat a unique and highly unusual case such as this one, and provides no basis for inference.

5. Contrary to the majority's assertion, it is not true that "achieving substantially the same outcome in all public liability actions, regardless of where filed, necessitates treatment of statutes of limitations as 'substantive rules for decision.' " Majority Op., at 8 n.5. Significantly, a finding that Congress did not intend the term "substantive rules for decision" to include statutes of limitations would not mean that there is no statute of limitations on public liability actions. Rather, in the absence of an express command

On the contrary, the legislative history indicates that the Amendments Act was based on the lessons of claims resulting from the TMI accident:

> The experience with claims following the TMI accident demonstrates the advantages of the ability to consolidate claims after the nuclear incident. Attorneys representing both plaintiffs and defendants in the TMI litigation testified . . . that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants . . . . The availability of the provisions for consolidation of claims in the event of any nuclear incident . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation.

S. Rep. No. 218, 100th Cong., 2d Sess. 13, *reprinted in* 1988 U.S. Cong. & Admin. News 1476, 1488; *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 853 n.18 (3d Cir. 1991) (stating that Congress' decision to enact the Amendments Act was based on the lesson of litigation resulting from the TMI accident). This indicates to me that Congress contemplated providing a mechanism for consolidating TMI cases to facilitate their continued litigation. This forward-looking approach evidenced by the legislative history is wholly inconsistent with a congressional desire to extinguish those suits on technical grounds.

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from Congress, federal courts "ordinarily do not assume that Congress intended that there be no time limit on such actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello v. Teamsters*, 462 U.S. 151, 158 (1983). If there is no indication in the legislative history as to what statute of limitations Congress intended the courts to apply to a given type of action, the "fallback rule of thumb" is to "apply the most closely analogous statute of limitations under state law." *Id.* at 158 & n.12. If the relevant state statute of limitations is an "unsatisfactory vehicle[ ] for the enforcement of federal law," however, courts may borrow timeliness rules from federal law—"either express limitations periods from related federal statutes, or such alternatives as laches." *Id.* at 161, 162. Thus, there are two possible outcomes if Congress did not intend for "substantive rules of decision" to include statutes of limitations and thus did not expressly provide for a statute of limitations for public liability actions: (1) the courts would apply state statutes of limitations anyway (although they would not fall under the rubric of section 20); or (2) the courts would apply a uniform statute of limitations to public liability actions drawn from federal law. In either event, all public liability actions arising from a single occurrence would be subject to the same statute of limitations, with the exception of cases already pending when the Amendments Act was passed.

Because I conclude that retroactive application of the choice-of-law provision means simply that Pennsylvania substantive law applies to and governs the instant litigation from August 20, 1988 forward, I respectfully dissent from the majority's far-reaching and overly broad interpretation of section 20 and from its conclusion that Pennsylvania's two-year statute of limitations reaches back in time to bar plaintiffs' suit. Accordingly, I would reverse.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7598

In Re: TMI

Dorothy L. Aldrich; Faith Alleman; Philip Angeli; Michael J. Anoka; Ruth V. Anoka; Catherine J. Balinosky; Regis E. Beasley; Louis Borda; Betty Marie Boylestein; George L. Boylestein; Shirlean Burhanan; Ruth E. Butler; Frank J. Caka; Susan H. Chynoweth; Daniel M. Chynoweth; Catherine Costello; John T. Costello; Martha A. Costik; Richard N. Costik; Mary Margaret Earhart; Edward Ferguson; Marco G. Glad, Jr.; Linda I. Glad; Barbara Grandon; Helen M. Hank; Edward John Hertzog; Marie H. Hertzog; Dianne Hindermyer; George Vance Hitz; Marjorie B. Hitz; Carol C. Hoch; Louis A. Hoch; Estate of Robert P. Holmes; Thelma M. Nagy; Barry Obercash; Georgeann Pristello; James J. Pristello; Jaime Lynn Pristello; Kenneth R. Snyder; Patricia Southard; Joseph Stewart; Charlotte Evelyn Stewart,

Appellants

(D.C. Civ. No. 88-cv-01452)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, GREENBERG, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and McKEE, *Circuit Judges*.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

_____

Circuit Judge

Dated: August 9, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7598

In Re: TMI

Dorothy L. Aldrich; Faith Alleman; Philip Angeli; Michael J. Anoka; Ruth V. Anoka; Catherine J. Balinosky; Regis E. Beasley; Louis Borda; Betty Marie Boylestein; George L. Boylestein; Shirlean Burhanan; Ruth E. Butler; Frank J. Caka; Susan H. Chynoweth; Daniel M. Chynoweth; Catherine Costello; John T. Costello; Martha A. Costik; Richard N. Costik; Mary Margaret Earhart; Edward Ferguson; Marco G. Glad, Jr.; Linda I. Glad; Barbara Grandon; Helen M. Hank; Edward John Hertzog; Marie H. Hertzog; Dianne Hindermyer; George Vance Hitz; Marjorie B. Hitz; Carol C. Hoch; Louis A. Hoch; Estate of Robert P. Holmes; Thelma M. Nagy; Barry Obercash; Georgeann Pristello; James J. Pristello; Jaime Lynn Pristello; Kenneth R. Snyder; Patricia Southard; Joseph Stewart; Charlotte Evelyn Stewart,

Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 88-cv-01452)

Present: Scirica, McKee and Sarokin, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel May 1, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 22, 1994, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

_____

Clerk

Dated: July 18, 1996

Costs Taxed in favor of Appellees as follows:

Total for Brief $355.50
Total $355.50

Certified as a true copy and issued in lieu of a formal mandate on August 19, 1996

Teste:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

EFFECTIVE DATES

1988 Acts. Section 20 of Pub.L. 100-408 provided that:

"**(a)** Except as provided in subsection (b), the amendments made by this Act [enacting section 2282a of this title, amending this section and sections 2210 and 2273 of this title, and enacting provisions set out as notes under section 2011 and 2210 of this title] shall become effective on the date of the enactment of this Act [Aug. 20, 1988] and shall be applicable with respect to nuclear incidents occurring on or after such date.

"**(b)(1)** The amendments made by section 11 [enacting subsec. (hh) and (jj) of this section and section 2210(m)(3) of this title and amending section 2210(m)(2) and (o) of this title] shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act [Aug. 20, 1988].

"**(2)(A)** Section 234A of the Atomic Energy Act of 1954 [section 2282a of this title] shall not apply to any violation occurring before the date of the enactment of this Act [Aug. 20, 1988].

"**(B)** Section 223 c. of the Atomic Energy Act of 1954 [section 2273(c) of this title] shall not apply to any violation occurring before the date of enactment of this Act [Aug. 20, 1988]."

Supreme Court, U.S.
FILED
DEC 6 1996
CLERK

No. 96-730

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DOROTHY L. ALDRICH, et al.,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., MCDERMOTT INCORPORATED, RAYTHEON CONSTRUCTORS, INC., BURNS & ROE ENTERPRISES, INC. AND DRESSER INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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DATED: December 6, 1996

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23 pp

QUESTION PRESENTED

In 1988 Congress amended the Price-Anderson Act, creating a federal cause of action for persons claiming injury as a result of a nuclear accident, and specifying that rules of decision in such actions were to be derived from the law of the State in which the nuclear accident occurred. Was it a violation of the Constitution for Congress to specify as part of that enactment that the new federal remedy would apply to all such claims, including those arising out of events which had occurred before 1988, when the consequence was that plaintiffs, suing on account of a March 28, 1979 nuclear accident in Pennsylvania, who were present in Pennsylvania during or following that accident, had the timeliness of their claims measured by Pennsylvania's statute of limitations?

PARTIES TO THE PROCEEDING

The Petitioners are: Dorothy L. Aldrich, Faith Alleman, Philip Angeli, Michael J. Anoka, Ruth V. Anoka, Catherine J. Balinosky, Regis E. Beasley, Louis Borda, Betty M. Boylestein, George L. Boylestein, Shirlean Burhanan, Ruth Butler, Frank J. Caka, Susan H. Chynoweth, Daniel M. Chynoweth, Catherine Costello, John T. Costello, Martha A. Costik, Richard N. Costik, Mary Marguerite Earhart, Edward T. Ferguson, Marco G. Glad, Jr., Linda I. Glad, Barbara Grandon, Helen M. Hank, Edward John Hertzog, Marie H. Hertzog, Dianne Hindermyer, George Vance Hitz, Marjorie B. Hitz, Caryl C. Hoch, Louis A. Hoch, Estate of Robert P. Holmes, Thelma M. Nagy, Barry Obercash, Georgeann Pristello, James J. Pristello, Jamie Lynn Pristello, Kenneth R. Snyder, Patricia Southard, Joseph F. Stewart and Charlotte Evelyn Stewart.

The Respondents are identified below, together with the information required by Rule 29.6:

GPU, Inc. (formerly General Public Utilities Corp.)
Parent: N/A
Subsidiaries Not Wholly Owned: O.L.S. Power L.P.; Brooklyn Energy L.P.; Prime Energy L.P.; Onondaga Cogeneration L.P.; Empress Guaracachi S.A.; Solaris Power; Avon Energy Partners Holdings

Metropolitan Edison Company
Parent: GPU, Inc.
Subsidiaries Not Wholly Owned: Saxton Nuclear Experimental Corp.

Jersey Central Power & Light Company
Parent: GPU, Inc.
Subsidiaries Not Wholly Owned: Saxton Nuclear Experimental Corp.

Pennsylvania Electric Company
Parent: GPU, Inc.
Subsidiaries Not Wholly Owned: Saxton Nuclear Experimental Corp.

The Babcock & Wilcox Company

Parent: Babcock & Wilcox Investment Company

Subsidiaries Not Wholly Owned: Abahsain Hudson Heat Transfer Co., Ltd.; Asea Babcock; Babcock & Wilcox Services, Inc.; Babcock-Ultrapower Jonesboro; Babcock-Ultrapower West Enfield; Diamond Power Specialty Limited; Ebensburg Investors Limited Partnership; Ebensburg Power Company; Especialidades Termomecanicas, S.A. DE C.V.; Maine Power Services; North American CWF Partnership; North County Operations Associates; Palm Beach Energy Associates; South Point CWF; Sunnyside Operations Associates L.P.

McDermott Incorporated

Parent: McDermott International, Inc.

Subsidiaries Not Wholly Owned: Chiyoda Hudson International Inc.; Construcciones Maritimas Mexicanas, S.A. DE C.V.; Delta Catalytic Saudi Arabia Ltd.; DynMcdermott Petroleum Operations Company; McDermott Engineers & Constructors (Canada) Ltd.; PDC Mantenimiento, S.A.; Tiger Sulphur Operations Ltd.; Trispec Technical Services Ltd.; Universal Fabricators Incorporated

Raytheon Constructors, Inc.

Parent: Raytheon Constructors International, Inc.

Subsidiaries Not Wholly Owned: N/A

Burns & Roe Enterprises, Inc.

Parent: Roe Enterprises, Inc.

Subsidiaries Not Wholly Owned: Burns & Roe Worly, Limited; Lin & Roe Co., Ltd.

Dresser Industries, Inc.

Parent: N/A

Subsidiaries Not Wholly Owned: Subsea Underwater Associates, Inc.

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No. 96-730

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DOROTHY L. ALDRICH, et al.,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., MCDERMOTT INCORPORATED, RAYTHEON CONSTRUCTORS, INC., BURNS & ROE ENTERPRISES, INC. AND DRESSER INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Third Circuit's judgment and opinion in this case, reported at 89 F.3d 1106 (3d Cir. 1996).

STATUTES INVOLVED

42 U.S.C. § 2210(n)(2) (as amended by Section 11(a) of the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066, 1076 (1988)) provides:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28, or within the 30-day period beginning on August 20, 1988, whichever occurs later.

42 U.S.C. § 2014(hh) (as amended by § 11(b) of the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066, 1076 (1988)) provides:

> The term "public liability action," as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

Section 20(b) of the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066, 1084 (1988) (codified as a note to 42 U.S.C. § 2014 ("Effective Dates")), provides:

> The amendments made by Section 11 shall apply to nuclear incidents occurring before, on, or after the date of the enactment of this Act.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, are individuals who were in Pennsylvania near the Three Mile Island nuclear plant in central Pennsylvania during or following the March, 1979 accident at that plant. Petitioners claim that their various illnesses were caused by radioactive gases released in that accident.

Pennsylvania has a two year statute of limitations for personal injury claims, which begins to run from the time a plaintiff has reason to know of both his injury and its alleged cause. Each plaintiff commenced an action in Pennsylvania, but more than two years after their asserted injuries were manifest. As a "protective" measure, Petition at 2, each plaintiff also filed actions in Mississippi state and federal courts, seeking to take advantage of Mississippi's six year limitations period.[1]

Subsequent to the filing of plaintiffs' various actions, Congress enacted the Price-Anderson Amendments Act of 1988, Pub. L. 100-408, 102 Stat. 1066 (1988) ("Amendments Act"). The Amendments Act created a federal cause of action for any claim that an injury resulted from the radiation hazard at a federally licensed nuclear facility, and directed that in such actions, the substantive rules of decision "shall be derived from the law of the State in which the nuclear incident involved occurs." 42 U.S.C. § 2014(hh). [2]

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1. At the time, Mississippi courts had interpreted the Mississippi borrowing statute as permitting application of Mississippi's six year limitations period to claims on behalf of out-of-state plaintiffs against out-of-state defendants on out-of-state causes of action, so long as the defendant was registered to do business in Mississippi. *See Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 667, 131 So. 84, 88 (1930); *see also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983). That interpretation has since been rejected by the Mississippi legislature. *See* Miss. Code Ann. § 15-1-65 (1996); *Patton v. Mack Trucks*, 556 So.2d 679, 680 n.1 (Miss. 1989).

2. Congress' stated purpose in creating a federal cause of action, and in specifying that all claims arising out of the same accident would be subject to the same rules of decision, was to assure efficiency and fairness in the disposition of all such claims. *See* S. Rep. No. 218, 100th Cong., 1st Sess. 13 (1987), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488; *In re TMI Cases Consolidated II*, 940 F.2d 832, 857 (3d Cir. 1991), *cert. denied sub nom. Gumby v. General Public Util. Corp.*, 503 U.S. 906 (1992).

Petitioners' grievance is that Congress expressly stated that the Amendments Act, in these particulars, would have retroactive applicability to claims — such as these — arising out of "nuclear incidents occurring *before* . . . the date of enactment of this Act." Pub. L. 100-408, § 20(b), 102 Stat. 1066, 1076 (1988) (codified as a note to 42 U.S.C. § 2014) (emphasis added). As a consequence of that congressional choice, petitioners lost any "protective" cover from their forum shopping trip to Mississippi.[3]

The Amendments Act required defendants to act within 30 days if they wished to remove pending actions pursuant to the Act, and defendants did so. The state court cases (both Mississippi and Pennsylvania) were removed directly to the Middle District of Pennsylvania, and the federal cases in Mississippi were transferred to that court. Defendants moved for summary judgment based on the Pennsylvania statute of limitations.[4] Both the District Court and the Court of Appeals determined that plaintiffs' claims were too late under Pennsylvania's limitations statute, and both rejected plaintiffs' contention that Congress could not constitutionally require that the timeliness of their actions commenced in Mississippi be measured by the law of the state where the nuclear incident occurred. *In re TMI Cases Consolidated II*, No. 88-1452 slip op. (M.D. Pa. Aug. 16, 1993), App. at A-25, *aff'd*, 89 F.3d 1106 (3d Cir. 1996), App. at A-64.

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3. As of the effective date of the Amendments Act, plaintiffs' need for such "cover" was acute, since the trial court and intermediate appellate court in Pennsylvania had ruled that their claims were barred under Pennsylvania's two year statute. *In re TMI Litigation - Cases Consolidated II*, 107 Dauphin Cty. Rep. 255 (1987), *aff'd, In re TMI Litigation Cases Consolidated II - Appeal of James D. Carrigan*, Nos. 00426 & 00445 (Pa. Super. July 15, 1988).

4. The Pennsylvania state judgments had not achieved finality because the 30 day period for removal required defendants to act before the time for plaintiffs to seek review in the Pennsylvania Supreme Court had expired.

REASONS FOR DENYING THE WRIT

I. Petitioners' Central Argument In Support Of A Writ Of Certiorari Was Never Raised Below

Petitioners contend that "[t]he question at the heart of [the] petition is whether Congress expressed any intent by the choice of law provisions of the Amendments Act that the retroactive application of Pennsylvania's statute of limitations to all actions arising from the Three Mile Island ('TMI') accident, should be so broadly interpreted so as to result in a shortening of the statute of limitations" that would otherwise have applied to their Mississippi actions. Petition at 6-7. This question of interpretation was never raised by them in any of the proceedings below.

The statutory provision at issue is contained in § 20(b) of the Amendments Act. That provision expressly states that the choice of law provision contained in section 11 of the Amendments Act (codified at 42 U.S.C. § 2014(hh)) "shall apply to nuclear incidents occurring before, on or after the date of the enactment of this Act." Petitioners have never argued that that provision, mandating retroactive application of the choice of law provision to public liability actions filed prior to the Amendments Act, should be interpreted in any way other than to require the retroactive application of the Pennsylvania statute of limitations to any action arising out of the TMI accident. Indeed, the Third Circuit stated:

> The district court held that § 20(b) read in conjunction with § 11(b), compels retroactive application of Pennsylvania's two year statute of limitations to the causes of action brought by the plaintiffs, mandating the dismissal of the Mississippi state and federal cases as time barred. *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip op. at 2-6 (M.D. Pa. Aug. 16, 1993). *Plaintiffs do not dispute this reading of the Amendments Act on appeal.*

89 F.3d at 1111, App. at A-69 (emphasis added). The court of appeals also explained:

> The district court held the language of § 20(b) is unambiguous and "by its very terms clearly requires the

> retroactive application of all of the provisions of § 11, including the choice of law provision." *In re TMI Litig. Cases Consol. II*, No. 88-1452, slip op. at 3 (M.D. Pa. Aug. 16, 1993). *Although plaintiffs have not challenged the district court's reading of the Amendments Act on appeal*, we exercise plenary review of the district court's construction of the Act. . . .

89 F.3d at 1111-12, App. at A-70 (emphasis added, citation omitted). *See also Id.* at 1112 n.6, App. at A-72 n.6 ("Finally, we note that plaintiffs have not argued that § 20(b) is ambiguous or that it exempts statutes of limitations from retroactive application.").

To the extent that Petitioners rely on an argument never previously raised by them in support of their Petition for certiorari review, the Petition should be denied. *Holly Farms Corp. v. National Labor Relations Bd.*, 116 S.Ct. 1396, 1402 n.7 (1996) ("Because we generally do not address arguments that were not the basis for the decision below . . . we decline to entertain Holly Farms' . . . argument.") (citation omitted); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S.Ct. 873, 880 n.5 (1996) ("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below.") (citation omitted); *United States v. Williams*, 504 U.S. 36, 40 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below.") (quotation and citation omitted).

II. There Is No Reason To Review The Court Of Appeals' Interpretation Of Congress' Intent Regarding The Choice Of Law Provision In The Amendments Act

Petitioners suggest that Congress did not intend, by the rules of decision provision, to retroactively change any limitations period that might otherwise apply to their claims. Petition at 6-7. Apart from the fact that no such interpretive argument was advanced below, the argument does not warrant review, since it has already been decided by this Court.

The choice of law provision contained in the Amendments Act was patterned after a similar provision contained in

the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331. *See* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18 (1987); *In re TMI Cases Consolidated II*, 940 F.2d 832, 855-56 (3d Cir. 1991) ("Congress adopted the approach to state law embodied in the Outer Continental Shelf Lands Act."), *cert. denied sub nom. Gumby v. General Public Util. Corp.*, 503 U.S. 906 (1992) ("*TMI II*"). The Lands Act choice of law provision has consistently been interpreted as requiring the incorporation of the adjacent state's substantive law as federal law. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-81 (1981); *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357 (1969). This Court has held that the state substantive law so incorporated includes the adjacent state's statute of limitations. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-4 (1971). The same rule applies to cases begun in forums outside the adjacent state. *Bonner v. Chevron U.S.A.*, 668 F.2d 817, 819 (5th Cir. 1982).

Given the legislative history of the Amendments Act choice of law provision, and the decisions of this Court treating statutes of limitations as "substantive rules" in the context of such a choice of law provision, the Third Circuit's application of the choice of law provision of the Amendments Act to include the limitations law of Pennsylvania is hardly novel. The opinion below does not conflict with the decisions of this Court or other circuits, which uniformly regard "substantive rules of decision" as including limitations laws.

III. There Is No Constitutional Issue Warranting Review, Because The Decision Below Is Consistent With The Prior Decisions Of This Court And Other Courts Of Appeals

Petitioners claim that review should be granted to correct an aberrant disregard of a constitutionally protected right to a period of limitations affecting their tort suits. To the contrary, the opinion below does not conflict with the decisions of this Court or other courts of appeals regarding the constitutionality of the retroactive application of statutes affecting pending actions.

The precedent in this Court firmly establishes that a plaintiff has no vested right in a cause of action. Rather, any "property" interest in a tort action is merely an inchoate possibility. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (person has no property, no vested interest, in any rule of common law); *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927) (plaintiffs, whose actions to enjoin the collection of illegal taxes were dismissed as a result of subsequently enacted federal legislation, had no vested right to an injunction and the filing of suits for same did not create one); *United States v. Heinszen & Co.*, 206 U.S. 370, 387 (1907) (bringing an action does not create a vested right in a particular outcome; therefore filing of action cannot divest government of the right to enact curative legislation).

The courts of appeals have applied this precedent consistently. *See, e.g., Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (retroactive application of a statute to pending litigation not unconstitutional, because a legal claim affords no enforceable property right until reduced to final judgment); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (same); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1374 (11th Cir.) (plaintiff has no vested interest in rule of law), *cert. denied*, 488 U.S. 822 (1988); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) ("A cause of action is property of a substantially different nature than real or personal property or vested intangible rights. It is inchoate and affords no definite or enforceable property right until reduced to final judgment."), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (plaintiff does not have a vested right in a tort cause of action until there is a final unreviewable judgment); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) (plaintiff has no vested right in tort claim for damages under state law). *See also TMI II*, 940 F.2d at 861 (rejecting plaintiffs' constitutional challenges to retroactive application of the jurisdictional provisions of the Amendments Act). The Third Circuit did not depart from these long stand-

ing principles in this case. 89 F.3d at 1113, App. at A-72 ("Under the United States Constitution, legislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not constitute a vested right.").

The well settled principle established by this Court, that the retroactive character of a statute comports with the constitutional mandate of due process if it constitutes a rational means of serving a legitimate congressional purpose, *see Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984), *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-19 (1976), guided the Third Circuit's determination below. The court of appeals' constitutional analysis is not in conflict with the decisions of this Court. Nor, as the court of appeals explained, is it in conflict with the decisions of other circuit courts:

> Other courts of appeals that have recently addressed the constitutionality of retroactive legislation that either abolishes or substantially affects a plaintiff's pending tort cause of action have reviewed such legislation on a "rational basis" standard. *See, e.g., In re U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 990-91 (9th Cir. 1987) (plaintiff challenging retroactivity bears the burden of showing that the legislature acted in arbitrary, irrational way), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *see also Hammond*, 786 F.2d at 13.

89 F.3d at 1113, App. at A-72-73. *See also Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989). *See generally O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1102 (7th Cir.), *cert. denied*, 114 S.Ct. 2711 (1994); *TMI II*, 940 F.2d at 860.

Petitioners misstate the import of this consistent line of appellate authority by suggesting that "[i]n neither *TMI II* nor the cited cases did the courts interpret the congressional intent in a manner that resulted in the arbitrary and irrational consequence of a complete retroactive dismissal that plaintiffs now suffer." Petition at 10. To the contrary, the retroactive

application of legislation resulting in dismissal of pending claims has been considered and upheld when, as here, retroactivity is rationally related to legislative objectives. *See, e.g., Hammond*, 786 F.2d 8 (1st Cir. 1986) (retroactive application of federal statute requiring substitution of United States as defendant held constitutional, despite result that plaintiff's complaint then dismissed for failure to have filed an administrative claim under Federal Torts Claims Act); *Arbour*, 903 F.2d 416 (6th Cir. 1990) (Westfall Act, requiring substitution of United States as defendant, held constitutional even though retroactive application of Act resulted in dismissal of pending cause of action for failure to exhaust administrative remedies); *In re Consol. Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987) (retroactive application of federal statute requiring substitution of United States as defendant not unconstitutional, even though plaintiffs' cause of action subsequently dismissed by application of defenses unique to United States); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir. 1988) (suit commenced when statute of repose had been declared unconstitutional was subject to dismissal pursuant to subsequent decision holding statute of repose valid). Thus, in all of these cases, the plaintiffs *were* left without a remedy. But the retroactive application of the statute causing that result was not unconstitutional, since the courts of appeals consistently analyzed the legislation as comporting with due process requirements established in the precedents of this Court.

The court below correctly concluded that the retroactive application of the Amendments Act's choice of law provision is not arbitrary or irrational. Its conclusion is in accord with the courts of appeals that have addressed the same or similar issues.

Congress enacted the Amendments Act "to effect uniformity, equity, and efficiency in the disposition of public liability claims" arising from nuclear accidents:

> By creating this federal program which requires the application of federal law, Congress sought to effect uniformity, equity and efficiency in the disposition of public liability claims. With the federal jurisdiction and removal provisions set forth in the Amendments Act, Congress

> ensured that all claims resulting from a given nuclear incident would be governed by the same law, provided for the coordination of all phases of litigation and the orderly distribution of funds, and assured the preservation of sufficient funds for victims whose injuries may not become manifest until long after the incident.

TMI II, 940 F.2d at 857. *See* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1 at 18 (1987) ("These measures stem from the desire of Congress for the equitable and uniform treatment of victims of a nuclear accident"); *accord O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1102 (7th Cir.) (retroactive application of removal provision in Amendments Act furthers goals of equal treatment of victims and avoidance of inconsistent results), *cert. denied*, 114 S.Ct. 2711 (1994).

A uniform limitations period applicable to all claims arising out of a particular nuclear incident is a rational means of furthering Congressional intent to ensure equitable and uniform treatment of nuclear accident victims. Uniform treatment of claimants is not possible if some claimants are subject to a two-year limitation period, while others are accorded the benefit of a six-year period, depending on the tactic of plaintiffs' counsel in instituting duplicative suits in a distant forum.

The goal of uniformity was to *eliminate* "the possibility of inconsistent outcomes." *TMI II*, 940 F.2d at 861. But that possibility is precisely what petitioners seek here. Petitioners wish to have the timeliness of their actions determined not according to a uniform rule for all TMI accident litigants, but instead by a longer rule of their choosing, thus resulting in disparate treatment of similarly situated plaintiffs. This is not what Congress intended.[5]

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5. Petitioners cite to *Ferens v. John Deere Co.*, 494 U.S. 516, 530- 31 (1990), for the proposition that they had a right to rely on the application of the statute of limitations applicable in the forum in which suit was commenced. Petition at 13. But *Ferens* is solely a product of jurisprudence developed under 28 U.S.C. § 1404. At issue here is the explicit directive of Congress that the federal rules of decision are to be derived from the law of the state in which the nuclear incident occurred. The choice of law questions that apply to a case transferred pursuant to § 1404 have no applicability to the constitutionality of the express choice of law provision contained in the Amendments Act, 42 U.S.C. § 2014(hh).

Retroactive application of the choice of law provision is also a rational means to further equitable treatment of public liability plaintiffs. It is not inequitable to hold a plaintiff in Pennsylvania to Pennsylvania's limitations period for a cause of action arising in Pennsylvania out of a facility located in Pennsylvania. As the Third Circuit concluded, "retroactive application advances equity by applying the same law to all similarly situated plaintiffs and eliminating inconsistent results." 89 F.3d at 1113, App. at A-73.

Retroactive application of the choice of law provision is also a rational means to promote efficiency because, as the court of appeals explained, that provision supports the constitutional exercise of federal jurisdiction over pending public liability actions, thus allowing for their consolidation and administration in one forum. *See* 89 F.3d at 1114-15, App. at A-73-75.

For the foregoing reasons, the court of appeals correctly concluded that

> [b]ecause retroactive application of the choice of law provision to pending causes of action advances Congress' goal of uniformity, equity and efficiency in the disposition of claims arising from nuclear accidents, it is not arbitrary and irrational. Plaintiffs have not demonstrated retroactive application violates constitutional due process. *Cf. O'Conner v. Commonwealth Edison Co.*, 13 F.3d at 1102 (retroactive application of Amendments Act not arbitrary and irrational); *In re TMI Litig. Cases Consol. II*, 940 F.2d at 860-61 (same).

89 F.3d at 1115, App. at A-75-76.

The Third Circuit's analysis in these cases is consistent with the decisions of this Court and other courts of appeals. There is no conflict of authority warranting this Court's review.[6]

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6. Nor is there any conflict with the decisions of this Court regarding "a constitutional right to a grace period." Petition at 11. Petitioners cite *Block v. North Dakota, ex rel. Board of University and Sch. Lands*, 461 U.S. 273

IV. The Decision Below Does Not Raise An Important Federal Question Requiring This Court's Review

Section 20(b) of the Amendments Act expressly provides that the choice of law provision is to be given retroactive effect so that it applies to cases pending at the time of enactment. Thus, this case does not raise any issue of statutory construction comparable to those considered in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), or to be considered in connection with this Court's review of *United States ex rel. Schumer v. Hughes Aircraft Company*, 63 F.3d 1512 (9th Cir. 1995), *cert. granted*, 117 S.Ct. 293 (1996). Both of those cases involve determinations of whether legislation should be applied retrospectively "in the absence of an instruction from Congress." *Landgraf*, 114 St.Ct. at 1496.

Here Congress has expressly and unambiguously addressed the question. In such a case, "there is no need to resort to judicial default rules," *Landgraf*, 114 S.Ct. at 1505, considered important for this Court's review in the cited cases. The only question is whether the constitution bars Congress' specific directive to apply the legislation retroactively. That question has been answered authoritatively by this Court in earlier cases and, therefore, does not require further review.

(1983), and *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), for the proposition that the legislature must allow a reasonable time before a statute shortening a limitations period takes effect. Petition at 11-12. But, as the district court correctly concluded, the cited cases involved "vested rights." *See Block*, 461 U.S. at 286 (dispute between United States and North Dakota regarding rights to real property); *Texaco*, 454 U.S. at 527 (dispute over termination of dormant mineral rights).

> Recent cases have clearly distinguished these "vested rights" cases from those involving personal injury or tort claims. In *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), the First Circuit stated that
>
> > because [in vested rights cases] the rights had 'vested' in real property, a contract, or in a fixed sum, they were said to stand independent of the statute that created them and could not be abridged by the subsequent statute. In none of these cases was any right to a tort cause of action, or a right deriving from a tort, held to be vested.
>
> *In re TMI Litig. Cases Consol. II*, slip op. at 8-9 (M.D. Pa. Aug. 16, 1993), App. at A-30.

The court below followed that directive, as have the decisions of other courts of appeals facing similar questions. This Court has not considered those decisions to raise important federal questions warranting review. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S.Ct. 2711 (1994); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied sub nom. Gumby v. General Pub. Utils. Corp.*, 503 U.S. 906 (1992); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 892 (9th Cir. 1987), *cert. denied sub nom. Konizeski v. Livermore Labs*, 485 U.S. 905 (1988). The federal question is well settled. Further review would not be instructive.

Nor would review likely affect any other cases. While there were numerous other TMI cases subject to the bar of the Pennsylvania statute of limitations in cases originally filed in Mississippi courts, all of those cases have been dismissed by summary judgment on the merits. *In re TMI Cases Consolidated II*, 927 F. Supp. 834 (M.D. Pa. 1996), appeal pending. No remaining TMI case involves the question raised here because all of the remaining cases were filed only in Pennsylvania. None is a "protective" action filed in a distant forum with a longer statute of limitations.

Nor is counsel aware of any other public liability actions, arising out of other nuclear incidents, commenced prior to the 1988 enactment of the Amendments Act, in distant forums, to take advantage of that distant forum's longer statute of limitations. The issue presented by the retroactive application of the Amendments Act here is unique to the circumstances of the TMI litigation, in which the entire question is virtually moot. For that reason as well, the petition does not present federal questions of continuing importance requiring further review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

(4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-730

Dorothy L. Aldrich, et al.,

Petitioners,

v.

General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, Raytheon Constructors Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI

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DATED: December 18, 1996

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I. INTRODUCTION

Respondents, in their brief, spend a significant time contesting the merits of Petitioners' claims. These arguments simply highlight the significant issues raised in this petition and why this Court should grant a Writ of Certiorari. The Respondents also suggest that Petitioner's central argument — that the retroactive applicability of the Amendments Act's choice of law provision to the statute of limitations — was not raised below despite the opinion of the dissenting panelist considering the issue at length.

This reply responds to the arguments opposing further review by this Court.

II. REPLY REASONS FOR ALLOWING WRIT

A. THE INEQUITY RESULTING FROM RETROACTIVE APPLICATION OF THE AMENDMENTS ACT TO THE STATUTE OF LIMITATIONS IS AN IMPORTANT ISSUE OF FEDERAL LAW

The Respondents contend that because Congress based the Amendments Act's choice of law provision, 42 U.S.C. §2014(hh), on a similar provision in the Outer Continental Shelf Lands Act, 43 U.S.C. §1331, *ipso facto* makes the retroactive application of §2014(hh) to the Petitioners' claims to shorten the statute of limitations and abolish their claims appropriate. As discussed in our Petition there is no rational basis supporting the interpretation urged by the Respondents and adopted by the majority panel.

Indeed, Respondents surprisingly suggest that *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) supports their interpretation. It does not. In that case, this Court was especially troubled that the retroactive application of its decision in *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969) would result in the application of a shorter statute of limitations to a claim that had been proceeding in a timely fashion for more than a year before *Rodrique* and result in it being time-barred.

Recognizing the inequity of the situation, this Court held that the shorter statute of limitations should not be retroactively applied:

> To hold that the respondent's lawsuit is retroactively time barred would be anomalous indeed. A primary purpose underlying absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for more than a year would surely be inimical to the beneficent purpose of the Congress.

Chevron Oil, 404 U.S. at 107-08 (citation omitted) This reasoning is directly applicable to Petitioners' claims.

The same inequities that applied to plaintiff Huson applies to the plaintiff Petitioners. Congress could not have intended that a rational basis of providing for a single forum to determine public liability actions to generate efficiencies and uniform results through the Amendments Acts would be well served by retroactively time-barring timely filed cases once they were transferred to the new forum. The majority's decision to disallow Petitioners' claims produces the most substantial inequitable result. Even standing alone, the issue is of such importance to federal law that the Petition should be granted.

B. THE RETROACTIVE APPLICATION OF A SHORTER STATUTE OF LIMITATIONS WITHOUT RESORT TO A GRACE PERIOD WAS UNCONSTITUTIONAL AND INCONSISTENT WITH THIS COURT'S RULINGS

Due process is violated when a new, shorter statute of limitations is imposed upon pending litigation without allowance of a reasonable grace period. *See Block v. North Dakota, ex rel. Board of University and Sch. Lands*, 461 U.S. 273, 286 (1983); *Texaco Inc. v. Short*, 454 U.S. 516, 527 (1982). This precedent was not adhered to by the Third Circuit.

The Respondents suggest that disregarding this line of cases was appropriate because Plaintiffs do not have a "vested right" in a cause of action. Respondents rely on the district court's opinion and a line of cases, all of which substituted a remedy in place of the shorter statute of limitations. *See Arbour v. Jenkins*, 903 F.2d 416, 419-422 (6th Cir. 1990); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805-806 (11th Cir. 1989); *In re Consol. U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 990-92 (9th Cir. 1987), *cert. denied sub nom., Konizeski v. Livermore Labs*, 485 U.S. 905 (1988); *Hammond v. United States*, 786 F.2d 8, 10-14 (1st Cir. 1986). Unlike the cases relied upon by the Respondents, in this instance Petitioners were not provided any substitute remedy. Petitioners claims were simply dismissed. That inequity violated their due process rights since they were not provided any grace period, regardless of the fact that their claims had not yet been reduced to a judgment.

C. THE IMPACT OF THIS DECISION WILL EXTEND BEYOND THIS LITIGATION

Finally, the Respondents contend that the issue presented in this Petition regarding the retroactive application of specifically lobbied for legislation to eliminate presently pending litigation should not be reviewed because this Court has previously denied certiorari in cases presenting similar questions and because they do not believe that any other litigants will be effected by a ruling. They are wrong.

This Court's previous denials of certiorari in similar appeals has no precedential authority. Also hundreds of additional TMI plaintiffs could be directly affected by this ruling.

More importantly, however, a ruling by this Court will make clear that litigants can not buy their way out of litigation through lobbying and usurp the role of the courts in finally determining and resolving existing cases and controversies by retroactively abolishing the rights of ordinary citizens.

III. CONCLUSION

For the foregoing reasons and those set forth in Petitioner's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: December 18, 1996

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